

THE
Provincial Insolvency Act, 1920
with Complete Commentaries and Forms

A. GHOSH.

FIFTH (Enlarged) Ed.
1925

EASTERN LAW HOUSE
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The Provincial Insolvency Act,
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THE

Provincial Insolvency Act, V OF 1920

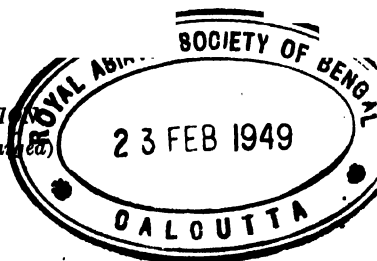
WITH INTRODUCTION, STATEMENT OF OBJECTS & REASONS, NOTES ON CLAUSES,
PROCEEDINGS IN COUNCIL, RULINGS UNDER THE BANKRUPTCY ACTS &
OF THE SEVERAL HIGH COURTS & CHIEF COURTS IN INDIA &
BURMA, COMPARATIVE TABLES, NEW RULES FRAMED BY
THE DIFFERENT HIGH COURTS, MODEL FORMS OF
PETITIONS & PLEADINGS, &C., &C., &C.,

BY

A. GHOSH, B.A., B.L.,

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Acquisition in Calcutta, Law of Benami Transactions, &c. &c.*

FIFTH EDITION
(Revised & Enlarged)



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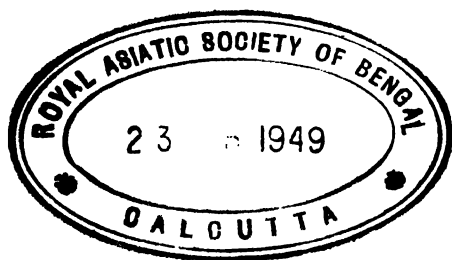
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PREFACE TO THE FIFTH EDITION.

The present Edition has been further developed and reorganised in accordance with the plan which was adopted last year and which has been so favourably commented on by all subscribers.

In addition to this, certain parts have been entirely re-written, notably the portions which relate to Partnership Assets, Secured Creditors, Jurisdiction, Fresh petition. The recent decision of the Privy Council in *Sat Narain v. Behari Lal*, (52 I. A. 22) introduces a completely new doctrine so far as the question of the vesting of the share of an insolvent father in a joint Mitakshare family is concerned, and its far-reaching effect on the economic condition of the society has been duly noted.

The inclusion of the New Rules framed by the Bombay High Court and over 150 New Cases completes and brings entirely up-to-date the present edition. The Forms have been revised and enlarged.

CALCUTTA :

1st July, 1925.

A. G.

PREFACE TO THE FOURTH EDITION.

Since the issue of the last edition of this book, questions which attracted considerable attention from the Bench & the Bar were: (a) whether the undivided share of a member in a Mitakshara joint family property is "property" within the meaning of Sec. 2 (1) (d) of the Act and vests in the Court or in a Receiver under Sec. 28 on the making of an order of adjudication; (b) whether the rights of a secured creditor are affected in so far as the goods in the possession, order and disposition of the insolvent in his trade or business by the consent or permission of the true owner under such circumstances that he is the reputed owner thereof, are concerned; (c) whether a Receiver in Insolvency occupies the same position as a Receiver in action; (d) whether for resistance to Receiver, the Insolvency Court has jurisdiction to commit for contempt of Court; (e) whether Insolvency Courts have jurisdiction to grant maintenance allowances to the insolvent according to his necessity and more than half his salary; (f) whether the Courts have, in the absence of express legislation on the matter, inherent jurisdiction to grant protection before adjudication in anticipation of arrest or imprisonment.

In this edition we have fully discussed these various questions in the light of the numerous cases decided since the publication of the last edition and have noted carefully the bearing of each case on the questions mooted.

The notes have been carefully revised, in many places re-written, and the case-law brought down to January, 1924. The New Rules recently framed by the different High Courts have been incorporated. New forms have been added and no pains have been spared to make this edition useful and up-to-date.

CALCUTTA:

15th February, 1924.

A. G.

PREFACE TO THE FIRST EDITION.

THE object of compiling this edition is not merely to present, in a handy volume, the principles of the law of insolvency in India, but also to attempt at solutions of the many difficult questions that frequently arise in its practical application. The principles have been explained, as far as possible, in the words of the judges and at the suggestion of several members of the profession, a set of petitions and pleadings under the present Act have been appended, mostly adapted from records of decided cases.

The New Rules under the present Act, V of 1920, could not be published in this edition, as they have not yet been framed. Some of the old Rules under Act III of 1907 have therefore been incorporated for purposes of reference.

In the compilation of this work I derived considerable benefit from such standard works as Robson on Bankruptcy, Williams on Bankruptcy and Lord Halsbury's Laws of England. I cannot but take this opportunity to express my heart-felt thanks to their learned authors.

In conclusion, I acknowledge my indebtedness to my friend, Mr. I. N. De, M.A., B.L., Vakil, but for whose untiring attention, from start to finish, in the compilation and get-up of this book, it would never have seen the light of day.

I will consider myself highly rewarded if this edition proves useful to those for whom it is intended.

CALCUTTA :

31st July, 1920.

A. G.

TABLES OF CONTENTS.

	PAGE.
Introduction	IX
Statement of Objects and Reasons	XII
Notes on Clauses	XIV
Proceedings in Council	XVII
Abbreviations	XXIII
Table of Cases	XXV
Provincial Insolvency Act—(Contents)	LVIII
Comparative Tables	LXIII
Provincial Insolvency Act—(Commentaries)	1
Schedule I	314
Schedule II	315
Schedule III	316
Model Petitions and Pleadings	317
Provincial Insolvency Rules—	
Calcutta <i>New Rules</i>	337
Allahabad <i>New Rules</i>	350
Madras <i>New Rules</i>	357
Bombay <i>New Rules</i>	367
Index	390

INTRODUCTION.

“Bankruptcy is a proceeding by which, when a debtor cannot pay his debts or discharge his liabilities or the persons to whom he owes money or has incurred liabilities cannot obtain satisfaction of their claims, the State, in certain circumstances takes possession of his property by an officer appointed for the purpose, and such property is realised and distributed in equal proportions amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities.”—*Blackstone*. The debtor at the same time obtains protection from legal proceedings by the persons to whom he has incurred debts or liabilities subject to certain clearly defined exceptions. When a man becomes bankrupt, he is during the bankruptcy, subject to certain disqualifications as a citizen. Although no longer looked upon as a crime, as it once was, bankruptcy is considered to involve a change of status and to carry with it *quasi-penal* consequences.

The English law of bankruptcy is entirely a creation of Statute law: there was no such thing as a common law of bankruptcy. The Statutes which govern the present law of bankruptcy in England are the Statutes 46 & 47 Vict. C. 52 and 53 & 54 Vict. C. 71, i.e., the Bankruptcy Acts of 1883 & 1890. These are only supplemented by Rules framed under powers given by these Acts, which provide only for the legal procedure and administrative machinery of bankruptcy proceedings.

The English Bankruptcy Acts form the basis of Indian insolvency legislation from the earliest times to the recent enactment, Act V. of 1920. Before the passing of the Presidency Towns Insolvency Act III of 1909, the law of insolvency as administered in the Presidency Towns and Rangoon was governed by the Indian Insolvent Act, 1848, 11 and 12 Vict. C. 21, and before the passing of the Provincial Insolvency Act, III of 1907, the law of provincial insolvency in India was governed by the Code of Civil Procedure, and the provisions of all these enactments are based upon the English Statutes, which have gradually been adapted to suit Indian requirements.

The first enactment on the law of Provincial Insolvency in British India is to be found in the Insolvency Chapter of the Civil Procedure Code of 1859. These provisions were somewhat extended by the C. P. Codes of 1877 & 1879, but from 1877 till the enactment of Act III of 1907

they remained in the C. P. Code unchanged and in the words of Lord Hobhouse, as "a germ and nothing more than a germ of an Insolvency law."

The scope of the insolvency chapter of the Code of Civil Procedure was limited to creditors *who had obtained decrees for the payment of money* and to judgment debtors *who had been arrested or imprisoned or whose property had been attached in execution of such decrees*. No protection was placed upon the rights of an individual creditor until the debtor's property had actually vested in the Receiver appointed under Section 354, and in the interim, suits might proceed and decrees might be executed with the result that while the petition was pending the whole of the property of the debtor might be sold for the benefit of a single decree-holder and to the exclusion of the rest of his creditors who might have refrained from embarrassing the estate with litigation because their claims had been duly scheduled. On the other hand, the relief to the insolvent was most inadequate, since it was strictly confined to discharge from the scheduled debts, all liability for which was terminated, by a rough and ready procedure, through the satisfaction of one-third or the efflux of twelve years. For the Punjab, there was a special, but incomplete law contained in eleven sections of the Laws Act, IV of 1872. In the words of the Hon'ble Mr. (now Sir) Earle Richards, K.C., the law for provincial insolvencies as contained in the C. P. C. and the Punjab Laws Act was too limited in scope, and neither afforded adequate relief to honest debtors nor sufficiently secured the rights of creditors.

To remedy these defects the Government of India considered that the insolvency provisions may with advantage be separated from the Code of Civil Procedure and passed as a separate enactment. In introducing the Bill on the 28th September, 1906, to the Imperial Council, the Hon'ble Mr. (now Sir) Earle Richards observed: "The Bill removed these restrictions by declaring that an insolvency petition might be presented by any creditor or by any debtor if the debtor had committed 'an act of insolvency' and an 'act of insolvency' was defined in the Bill (following English legislation and, to some extent, the law of Presidency Towns) to include acts which have the effect of defeating or delaying the rights of creditors. The scope of the Bill was therefore much more extensive than that of the present law. Further, under the Bill, the debtor would be released from prison immediately on the making of an order adjudging him insolvent ; and after his discharge, speaking generally, no proceedings

could be taken against him in respect of any debts provable in insolvency. Then as regards creditors, it would be found that the rights of the creditor were much better secured under the Bill than under the existing law. The order of adjudication was to relate back to the date of the presentation of the petition and from that time the property of the debtor was to be available only for the payment of debts under the insolvency. Provisions had also been added, following English law, for the avoidance of voluntary settlements and of transfers of property giving undue preference to particular creditors, and the provisions intended to prevent dishonesty on the part of the debtors had been made more stringent. In addition to this, clauses had been added to provide for compositions, summary administration, &c."

The general result of the Bill which was passed into the Act III of 1907 was to provide an insolvency law based on the lines of the English law of bankruptcy, but in a greatly simplified form, a form which it was hoped would be suitable to the requirements of the Mofussil and to the capacities of the Courts which would have to administer them.

During the eleven years that the Act III of 1907 remained in force its various defects and shortcomings were brought to light, and the necessity for a new and amended Provincial Act began to be keenly felt. To remedy these defects a Bill to amend the Provincial Insolvency Act, 1907, was introduced in the Indian Legislative Council in September, 1919. The various defects in Act III of 1907 which this Bill was intended to cure and the various improvements that have been introduced and effected in the Bill in view of present conditions are particularly set forth in the Statement of Objects and Reasons, Notes on Clauses and Sir George Lowndes' speech quoted verbatim, *infra*. The Bill received the assent of the Governor-General on the 25th February, 1920, and is now the law relating to insolvency in British India, outside the Presidency Towns and Rangoon.

Statement of Objects and Reasons.

Bill No. 14 of 1918.

A Bill further to amend the Provincial Insolvency Act, 1907.

"The object of this Bill is to amend the Provincial Insolvency Act, (III of 1907), which contains the law of Insolvency in force in British India outside the Presidency-towns and the town of Rangoon. The Act came into force on the 1st January, 1908, and since then with the exception of a few unimportant amendments made in 1914, it has not been amended. Ten years' experience of the practical working of the Act has brought to light many defects which have from time to time provoked criticism from most of the Local Governments and not a few of the Judges who have had to administer its provisions. Numerous suggestions for the amendment of the Act on various points have also been received from time to time from the commercial communities and members of the legal profession.

2. The chief indictment of the Act is that it lends itself to the protection of fraudulent debtors that it subjects an undischarged insolvent to little or no practical inconvenience, and that its provisions for the punishment of fraudulent insolvents are not effective in practice.

3. One of the principal defects in the existing law arises from the fact that the conduct of the debtor in many cases never comes under the scrutiny of the Court. The stage at which the misconduct of the debtor should come before the Court, and at which most of the provisions affecting a fraudulent insolvent would operate, is when he applies for his discharge. But there is nothing in the Act which requires him to apply for his discharge, and in practice such applications are rare. To remedy this unsatisfactory state of the law, it is proposed to include in the Act provisions which will compel an insolvent to apply to the Court within a prescribed period of his discharge or to lose the protection afforded by the insolvency proceedings. The Court will have power to extend the prescribed period and when the adjudication order is annulled owing to the failure of the insolvent to apply in time for his discharge, a fresh petition on the same facts will be barred. These proposed changes are effected by the proviso to proposed new section (6) C in clause 4 of the Bill, new sub-section (1)A (ii) in clause 10, the amendments in clause 11 (1), (3) and (4), and the amendments in clause 20.

4. "It is now settled law that under the Act, as it stands, it is not open to the Court to reject the petition of a debtor on the

ground that the application is an abuse of the law. While admitting that the object of an insolvency law is to deal with all insolvents, whether honest or not, and that no applicant who is in fact insolvent should be liable to have his petition dismissed *in limine*, it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case, the debtor being required to show that he is in fact unable to pay his debts and that he has not concealed his property. These changes in the existing law are effected by the amendments in clause 9. and 19 (2) and by clause 12 which inserts a new section 16A as to protection orders on the lines of section 25 of the Presidency Towns Insolvency Act, 1909.

5. A further defect in the Act is the absence of provisions sufficiently defining the power of Courts to decide questions of law and fact arising in insolvency proceedings. In certain cases, *e.g.*, those mentioned in section 17 (3), 36 and 37, the Court is empowered to pass orders, and section 47 defines the general powers of the Court in regard to proceedings under the Act, but nowhere is a general power conferred on the Court to deal with and decide important questions of law and fact (*e.g.*, a question of title to property) which may arise in the insolvency proceedings. This question has recently been the subject of conflicting decisions in the Allahabad and the Calcutta High Courts. In *Nilmoni Chowdhri v. Durga Charan Chowdhri* (22 C. W. N. 704), the Calcutta High Court dissenting from the Allahabad High Court held that the Insolvency Court has no such power, and a question of title to property should be tried in a separate suit. It is obviously desirable that this conflict between the two High Courts should be terminated, and having regard to the prevalence of *benami* transactions in India and the importance of arming Courts with adequate powers for the speedy realisation of assets in the interests of creditors, the Government of India are of opinion that the Courts should be given full power to decide all questions raised in insolvency proceedings. Clause 3 of the Bill accordingly enacts a provision on the lines of section 7 of the Presidency Towns Insolvency Act.

6. Proceedings instituted against fraudulent insolvents are frequently infructuous. This is largely due to the lack of precision in the Act as to the procedure to be adopted by the Court which desires to take action. The wording of sub-section (2) of section 43 is unduly vague, regard being had to the fact that it constitutes a criminal

offence, and experience has shown that it frequently creates difficulties. It is proposed that the penal provisions of existing section 43 should be amended on the lines of section 103 of the Presidency Towns Insolvency Act, and that the procedure to be followed on a charge should be defined on the lines of section 104 of that Act. It is proposed to embody these provisions in the two separate sections 43-A and 43-B inserted by clause 19 of the Bill which also inserts a new section 43-C containing provisions similar to those of section 105 of the Presidency Towns Insolvency Act. It seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge, or after a composition submitted by him, has been accepted.

7. The summary administration of petty insolvencies is now largely governed by rules made by the High Courts under section 51 (2) (c) of the Act, but it seems desirable that the Act itself should contain more detailed provisions than at present, and that further simplification of procedure should be effected. It is proposed therefore that, in addition to any further modifications to be made by rules, section 48 should contain certain definite provisions, and it is thought that, if these changes are made, it would be well to confine summary administration to cases where the assets do not exceed Rs. 200 instead of the existing limit of Rs. 500, and to reserve a discretion to the Court to direct the ordinary procedure to be followed in cases where it thinks such a course desirable.

8. These amendments will, it is hoped, go far to check the abuses rendered possible by the defects in the existing law.

9. Opportunity has been taken to effect certain minor amendments in the Act, and an explanation of the reasons for the changes proposed will be found in the Notes on Clauses."—*Published in the India Gazette, dated 7th September, 1918, in Part V, page 63.*

Notes on Clauses.

"Clause 2.—The expression "available act of insolvency" is not used anywhere else in the Act, and a definition therefore seems unnecessary. No such definition is to be found in the Presidency Towns Insolvency Act. The amendment in the definition of "property" makes it clear that trust property is not to be dealt with under the Act as property of the insolvent. It is proposed to include a

definition of the expression "transfer of property" on the lines of the definition in section 2 of the Presidency Towns Act.

Clause 4.—Is principally a drafting amendment. The opportunity has been taken to split up section 6 into five separate sections with a view to re-arrange its different parts in their logical order. New section 6 (a) merely reproduces existing section 6 (6). New section 6 (b) deals with the conditions on which a creditor may petition and reproduces existing section 6 (4) and (5). New section 6 (c) deals with the debtor's petition and reproduces existing section 6 (3) with the addition of the Bill regarding the annulment of an order of adjudication.

New section 6 (d) reproduces existing section 6 (2) with the addition of a proviso which is designed to cure a defect. Section 6 (2) lays down where an insolvency petition is to be presented, but does not contain any saving in the event of the petition being presented in the wrong Court. The point was raised in *Madho Pershad v. Walton* (18 C. W. N. 1050), where the insolvent successfully presented an appeal on the ground that the petition had been presented in the wrong court. The proposed proviso is intended to stop this loophole in the existing law.

New section 6 (e) merely reproduces existing section 6 (1).

Clause 5.—Amends section 10 to make it clear that the object of continuing proceedings on the death of the debtor is for the purpose only of realising and distributing his property.

Clause 6.—This amendment appears to be necessary in view of the proviso to section 6 (c) in clause 4 and section 1 (a) (ii) in clause 10.

Clause 7.—Section 13 (2) gives power to appoint an *interim* receiver. It is considered desirable that an interim receiver should normally be appointed when the petition is admitted, and should be armed with such of the powers conferrable on a receiver under the Code of Civil Procedure as the Court may direct (*cf.* section 16 of the Presidency Towns Insolvency Act). It is thought, however, that these provisions would come more appropriately into section 12 of the Act.

Clause 8.—Is consequential to the amendment in clause 7.

Clause 11.—The first amendment is consequential to the first amendment in clause 14.

The amendment of section 16 (2) is consequential to the first amendment in clause 12, which inserts a new section as to protection order.

The other amendments in this clause are explained in paragraphs 3 and 4 of the Statement of Objects and Reasons.

Clause 13.—The first amendment is one of drafting, and the second is designed to obviate the necessity of sending notices to creditors who have not yet proved their debts and thus to shorten the proceedings.

Clause 14.—Both sections 16 (1) and section 27 contemplate the possibility of a composition or scheme before adjudication. The Presidency Towns Insolvency Act in section 28, on the other hand, only contemplates a composition after adjudication. Under the English Law a composition can be made (1) after the receiving order and prior to adjudication, or (2) after adjudication. But under the Indian law there is no receiving order procedure at all, and the order of adjudication is made on the hearing of the petition. It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it, in dealing with compositions or schemes prior to adjudication. It is therefore proposed to follow in this respect the procedure under the Presidency Towns Insolvency Act and allow compositions and schemes only after adjudication. This is effected by the first two amendments.

The third amendment in this clause is a drafting one——*cf.* sub-section (7) of section 27.

Clause 15. As it stands, section 34 would not prevent the whole of the debtor's property from being sold for the benefit of an individual creditor after the filing of the petition and before the order of adjudication is made. The amendment prevents this and brings the section into line with section 53 of the Presidency Towns Insolvency Act.

Clause 16.—This amendment is consequential to the proposed definition of "transfer of property" in section 2.

Clause 17.—Makes it clear that the transactions referred to in section 38 are *bona fide* transactions. There appears to be no doubt that this is the intention.

Clause 18.—Apparently the duties imposed on the debtor by sub-section (1) of section 43 arise as soon as the Court has made an order under section 12 (1). It seems desirable to make this clear. It is difficult to see how the debtor can be under any obligation to assist in the distribution of his property unless he is adjudged an insolvent. It is proposed therefore to amend the concluding part of sub-section (1), and to relegate to a separate sub-section the provisions which

impose on the debtor the duty of aiding in the distribution of his property. Clause 18 effects these changes.

Clause 21.—The effect of existing section 45 is to release a discharged insolvent from liability under an order of maintenance made under section 488 of the Code of Criminal Procedure, 1898, and in this respect the section is in conflict with section 45 of the Presidency Towns Insolvency Act. It is proposed to bring it into accord with the latter Act.

Clause 22.—In view of the power which the proposed new section 3A would confer on Courts exercising insolvency jurisdiction, it is proposed to provide specifically that decisions in the exercise of this power shall be appealable.

Clause 24.—Under the Indian law no statutory disabilities attach to the position of an undischarged insolvent. It is doubtful whether public opinion in this country is at present inclined to attach much disgrace to a person of this position, but it appears desirable that the sense of the community should be stimulated by providing certain statutory disqualifications in addition to those already imposed, *e.g.*, by the Regulations relating to members of the Legislative Council. A parallel provision is to be found in section 32 of the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52).

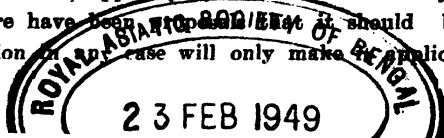
Clause 25.—These amendments are introduced with a view to curtail the excessive number of notices which are at present required to be published in the Gazette." *India Gazette, dated 7th September, 1918.*

Proceedings in Council.

THE HON'BLE SIR GEORGE LOWNDES:—

'My Lord, I beg to move for leave to introduce a Bill to amend the Provincial Insolvency Act, 1907. The Act in question was introduced and passed shortly before the passing of the new Civil Procedure Code of 1908, in order that it might take the place of the very rudimentary provisions in dealing with insolvents outside the presidency towns which were contained in the Act. As Members of this Council are aware the other insolvency Act we have in India, the Presidency Towns Act, applies ~~only to the Presidency towns and Rangoon.~~ There have been proposals that it should be extended, but the extension in any case will only make it applicable to other

B



large towns of India, such as Karachi, Cawnpore and so forth and therefore it is clearly necessary for us to have a provincial Act to deal with insolvencies in a more simple way outside bigger towns. The Act of 1907 was largely experimental at the time it was passed, and my predecessor in office, Sir Erle Richards, in moving the Report of the Select Committee on the Bill quite recognised that it was not altogether a satisfactory measure. I think we may say that the experience of ten years or eleven years now, has shown that this was not an unwise forecast. During the ten years we have had criticisms of the provisions of the Act both from the Courts and from the general public, and not very long ago, it was thought desirable to address Local Governments on the subject. The replies we received showed that complaints were frequent, and that there were many defects in the Act which it was obvious ought to be remedied. As a result, last September, we convened in Simla a small informal Committee to deal with questions which were then before us. We had the assistance of various Hon'ble Members of this Council, including my Hon'ble legal friends, Mr. Chanda and Mr. Krishna Sahay; my Hon'ble colleague, Sir William Vincent, attended the Committee and we also had the benefit of Sir Ashutosh Mukherji's great experience. We had two District Judges, if I remember aright, on the Committee, considered and very valuable recommendations were made to Government by the Committee, the outcome of which is the present Bill. The Committee thought that it would be unwise to retain the existing Act, and that it would be sufficient to amend it, though as Hon'ble Members will see the amendments come to a considerable number, and we of course accepted that view. The present Bill is to some extent complementary to the Usurious Loans Act, which was passed in the last session of the Council. Hon'ble Members may remember that my Hon'ble colleague, the Home Member, then in dealing with the Usurious Loans Act, pointed out that it would be necessary and indeed only fair alongside of the Usurious Loans Act either to pass a new Provincial Insolvency Act, or to amend the existing Act and this Bill is now introduced in fulfilment of the promise which I may say was then made.

"The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. As the Usurious Loans Act was introduced for the protection of honest debtors against dishonest creditors, so an amended insolvency Act is necessary for the protection of honest creditors against dishonest debtors. Under the

present Act it is comparatively easy for a dishonest debtor to evade his responsibilities. As many Hon'ble Member will know, it is quite a common thing for a man when cornered, so that he has either to go to jail or pay, or to file his petition in insolvency. There is a provision (sec. 55 (4), I think) of the Civil Procedure Code which entitles him on giving notice that he will file his petition to have execution against his person stayed, and we shall undoubtedly have to consider whether that section of the Civil Procedure Code will not have to be amended if this Bill is passed in its present or any other form. But I will pursue for the moment the course of the dishonest debtor; he files his petition, and if he is in jail he automatically gets his release under the existing Act, and he is practically protected from going to jail again. That is sufficient for him; that is all he wants; he does not want to pay his debts; all he wishes is to escape the penalty of jail. It is not necessary for him to apply for his discharge, and until he applies for it, the Court has practically no power over his misdoings. The existing Act, it is true, lays certain disabilities on an undischarged insolvent, but these do not affect the dishonest debtor. He can not borrow money without disclosing his condition. But, in the first place, he probably does not know that there are any such disabilities at all; if he does he borrows all the same in disregard of the Act, and no body takes the trouble to prosecute him. Then again no stigma whatever apparently attaches to being an undischarged bankrupt under the conditions. Of course in other parts of the world the stigma is great, but apparently among provincial insolvents there is no feeling at all on the subject and they can go on borrowing for years. This is the state of things that we have tried to remedy by this Amendment. We propose in the first place to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed by the Court, which we hope, will in most cases be a fairly short one. If the insolvent does not apply for his discharge and it must be remembered that his doing so will enable the Court to deal with any malpractices he may have committed, he will lose the protection of the Court altogether. His adjudication will be annulled, and it is provided that he cannot file another petition on the same facts. That in the first place. In the second place, we propose to abolish the automatic protection which he gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act, which provides that immediately on adjudication, the insolvent should be released from jail and make it necessary for him

to apply to the Court for protection leaving it to the discretion of the Court to grant him protection in any degree it thinks fit. Then, in the third place, we propose to lay upon him as an undischarged insolvent, so long as he remains undischarged, certain civil disabilities, such as incapacity to hold certain offices. This, if I may say so, is fairly based on the principle that a man who cannot manage his own affairs should not be entrusted with the affairs of others. This will be for the Select Committee to consider whether in this respect we have gone far enough.

“ The Bill is rather a long one, and owing to its being in the usual form of amending Acts is rather a difficult one to follow, and we have therefore made the Objects and Reasons and the Notes on Clauses rather more complete and full than they would ordinarily be. I do not propose to go through the various amendments in detail, but there are one or two points to which I think, I ought to refer very shortly. The first, is, that the present Act gives no precise power to an insolvency court to decide questions of law or fact that arise incidentally in the courts of insolvency proceedings. With regard to this there have been conflicting decisions in the Allahabad and Calcutta Courts, and we think that the point should be definitely settled by the Amending Bill. It is not altogether easy to see which is the wisest course to follow. If the power to decide questions of law and fact does exist, a summary decision by a Court of Insolvency may have more far reaching effects than was intended at the time. On the other hand, if the power does not exist, all the Court can do, is to refer the parties to a separate suit, and the result is interminable delay during which the wearied creditor may be driven from court to court, and eventually may have to come to a compromise with the debtor on disadvantageous terms. We have chosen what we think as at present advised to be the better of two alternatives, and have provided that the Court shall have power to decide any questions that arise incidentally in the insolvency, but leaving it to its discretion whether it should do so in a particular case or should refer the parties to a separate suit. Between this Scylla and Charybdis we hope that the Select Committee will be able to steer our bark to safety. I may say that in regard to this point, as in many others, whether we have proposed amendments of the Acts, we have adopted the corresponding provisions of the Presidency Towns Insolvency Act. This was passed just two years after the Provincial one and seems to have been rather better considered, and in many cases, I may say,

better drafted. We think that there is no reason why there should be any material difference in minor provisions between the two Acts, and therefore in many cases, where we wanted a better model, we have gone to the Presidency Towns Act and adopted provisions from it.

“ The next point to which I should like to refer very shortly, is the amendment which we propose in Section 12, that in every case, unless for reasons to be recorded in writing the Court otherwise directs, on a petition of insolvency being admitted, an *interim* receiver should be appointed at once, in order that he may be in a position from the very outset to get hold of the assets of the insolvent. In this connection, I ought also to refer to the question of Official Receiver. No doubt for the efficient administration of any insolvency a competent official receiver is necessary and if we could provide official receivers throughout India for all the mofussil insolvency courts, we should be very glad to do so. But as Hon'ble Members are aware, Official Receivers have to look to fees for their remuneration, or at all events Government should have to consider the question of fees in fixing their remunerations, and the fees in most District Courts in insolvency matters would be very small. Therefore, though we recognise that it will be very desirable to have official receivers, if we could, throughout India, the cost would practically make it impossible, and we do not look forward at present to any great extension of the system of appointing official receivers. Where there is an official receiver he would no doubt nominally be appointed interim receiver. We have provided that no interim receiver should have all the powers that are conferrable on a receiver under the Civil Procedure Code. In this respect, again, we have followed the model of the Presidency Towns Act.

“ The next point I should like to refer to is the penal provisions of the Act. Section 43 of the existing Act is lacking in precision, and clearly wants a re-modelling. Its form has led to many difficulties and we therefore propose to re-cast it, again resorting to the model of the Presidency Towns Act, which seems to us to be better. I should like to say in this connection that the ideal state of affairs would undoubtedly be that an Insolvency Act should itself deal only with what I may call the special offences under the Act, such as refusal or neglect to comply with orders of the court or statutory requirements, and that all graver offences, such as fraud, gross misconduct and the like, should be left to be dealt with under the provisions of the general law. I should like myself to see a chapter of the Penal

Code dealing with all such offences, and in that case we should be able to omit both from our Provincial Insolvency Act and the Presidency Towns Act a good deal of the present penal provisions. The Insolvency Court would then only deal with special offences, and in respect of any graver offences which come to its notice during the enquiry, it would only order prosecution in a criminal court. That is, I will not say, an utopian idea,—I think it is an idea that we may be able to bring into practice before very soon. It has not, of course, been possible to deal with it in this Bill, as it would have meant amendment not only of this Act but of the Presidency Towns Act and of the Penal Code, but I look forward to it as a possible piece of legislation in the future.

“There is one other point, my Lord, I should like to deal with, and that is the question of summary administration of small insolvent estates. We propose to simplify the procedure further in order that there may be a more expeditious winding-up and distribution of the assets. The committee to which I have already referred recommended that the present limit of Rs. 500 for summary administration should be reduced to Rs. 200, and we have adopted this in the Bill. At the same time, it has been suggested to us that the right policy would rather be the other way, to bring in rather bigger estates, and instead of reducing the limit, to extend it from Rs. 500 to Rs. 2,000. Here again, we hope that the advice of the Select Committee will assist us. I should state that it is not proposed to proceed with the Bill at present, but merely to publish it and take it up again next session.

“I regret that I have taken so long over the explanation of this Bill, a very dull matter in this exciting time, but it is one in which I have taken great interest, and I hope we may look forward to its being a useful, and at the same time, a non-contentious piece of legislation.”

The Hon'ble Sir George Lowndes:—“My Lord, I beg to introduce the Bill, and to move that the Bill, together with the Statements of Objects and Reasons relating thereto be published in the Gazette of India in English and in the local official gazettes in English and in such other languages as local governments think fit.”

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ABBREVIATIONS.

INDIAN REPORTS.

A.I.R.	.	.	.	All India Reporter.
All.	.	.	.	Indian Law Reports, Allahabad Series.
A.L.J.	.	.	.	Allahabad Law Journal.
A.W.N.	.	.	.	Allahabad Weekly Notes.
Bom.	.	.	.	Indian Law Reports, Bombay Series.
B.H.C.R.	.	.	.	Bombay High Court Reports.
B.L.R.	.	.	.	Bengal Law Reports.
Bom. L.R.	.	.	.	Bombay Law Reporter.
Bur. L.R.	.	.	.	Burma Law Reports.
Bur. L.T.	.	.	.	Burma Law Times.
Cal.	.	.	.	Indian Law Reports, Calcutta Series.
C.L.J.	.	.	.	Calcutta Law Journal.
C.L.R.	.	.	.	Calcutta Law Reports.
C.W.N.	.	.	.	Calcutta Weekly Notes.
C.W.N. (Pat.)	.	.	.	Calcutta Weekly Notes, Patna Cases.
Cr. L.J.	.	.	.	Criminal Law Journal of India.
C.P.L.R.	.	.	.	Central Provinces Law Reports.
Ind. Cas.	.	.	.	India Cases.
L.W. or M.L.W.	.	.	.	Law Weekly, Madras.
L.L.J.	.	.	.	Lahore Law Journal.
L.B.R.	.	.	.	Lower Burma Rulings.
Mad.	.	.	.	Indian Law Reports, Madras Series.
M.H.C.R.	.	.	.	Madras High Court Reports.
M.L.J.	.	.	.	Madras Law Journal.
M. L.T.	.	.	.	Madras Law Times.
M.W.N.	.	.	.	Madras Weekly Notes.
M.I.A.	.	.	.	Moore's Indian Appeals.
N.L.R.	.	.	.	Nagpur Law Reports.
N.L.J.	.	.	.	Nagpur Law Journal.
O.C.	.	.	.	Oudh Cases.
Pat. L.J.	.	.	.	Patna Law Journal.
P.R.	.	.	.	Punjab Record.
P.L.R.	.	.	.	Punjab Law Reporter.
P.W.R.	.	.	.	Punjab Weekly Reporter.
S.L.R.	.	.	.	Sind Law Reporter.
U.P.L.R.	.	.	.	U. P. Law Reporter.
U.B.R.	.	.	.	Upper Burma Rulings.
W.R.	.	.	.	Sutherland's Weekly Reporter.

ENGLISH REPORTS.

A.C.	. . . . .	Law Reports, Appeal Cases, Chancery Division.
Ad. & El.	. . . . .	Adolphus and Ellis Reports.
Atk.	. . . . .	Atkyn's Reports.
B. & C.	. . . . .	Barnewall and Creswell's Reports.
C.P.D.	. . . . .	Law Reports, Common Pleas Division.
Ch. App.	. . . . .	Law Reports, Chancery Appeals.
Ch. D.	. . . . .	Law Reports, Chancery Division.
Deac. & Ch.	. . . . .	Deacon and Chitty's Reports.
De. G.J. & S.	. . . . .	De. Gex Jones and Smith's Reports.
Eng. & Ir. App.	. . . . .	English and Irish Appeals.
Hy. Bl.	. . . . .	Henry Blackstone's Reports.
K.B.	. . . . .	Law Reports, King's Bench Division.
L.J.	. . . . .	Law Journal.
L.J.C.P.	. . . . .	Law Journal, Common Pleas.
L.T.	. . . . .	Law Times Reports.
M. & W.	. . . . .	Messon and Welby's Reports.
Mans.	. . . . .	Manson's Bankruptcy and Company Cases.
Morr	. . . . .	Morrel's Reports, Bankruptcy.
Q.B.R.	. . . . .	Queen's Bench Reports.
Q.B.D.	. . . . .	Law Reports, Queen's Bench Division.
Sch. & Lef.	. . . . .	Schodeles and Lefroy's Reports.
Ves	. . . . .	Vesey Jun's Reports, Chancery.
Ves. & B.	. . . . .	Vesey and Beam's Reports.

TABLE OF CASES.

The figures in the margin refer to pages.

A

	PAGE.
Abbot v. Abbot, 5 B. L. R. 382	13
Abdul Aziz v. Habid Mistry, 49 Ind. Cas. 229 ...	38, 54, 80
Abdul Aziz v. Khirode, 41 Ind. Cas. 411 ..	221
Abdul Karim v. Official Assignee, 8 Mad. 168 ..	139, 181
Abdul Rahim v. Sital Prasad, 41 All. 658 ...	247
Abdul Rahman v. Behari Pusi, 10 All. 194 ...	161
Abdul Rajah v. Basiruddin, 14 C. W. N. 586: 11 C. L. J. 435	36, 37
Abdul Rajak v. Basiruddin Ahmed, 17 C. W. N. 405	72, 99
Abraham v. Sukias, 51 Cal. 337: 81 Ind. Cas 584: 1924 A. I. R. (Cal.) 707	114, 188
Abu Buker Haji Abdulla, <i>In Re.</i> , 48 Bom. 580: 26 Bom. L. R. 628	9, 121
Aburrahammal v. Official Assignee, Madras, 47 Mad. 215	137
Achambit Lal v. Chhanga Mal, 32 Ind. Cas. 429 ...	208, 239
Administrator General of Madras v. Official Assignee, 3 Ind. Cas. 163: 6 M. L. J. 188	86
Aiyaparaju v. Veeva Venkata. 44 M. L. J. 303: 1923 M. W. N. 195: 72 Ind. Cas. 488 ...	44, 306
Ajudhyanath v. Anantdas, 3 All. 799 ...	269
Akhoy Kumar v. Corporation, 42 Cal. 625: 21 C. L. J. 177	16
Akla v. Delhi, 28 Mad. 157	259
A. K. R. M. C. T. Chetty Firm v. Maung Aung Bwit, 1923 A. I. R. 21 (Rang)	61, 101
Alderson, <i>In Re.</i> , <i>Exparte</i> Jackson, 1895, 1 Q. B. 193	46
Algappa Chettier v. Chakalingam, 40 Mad. 904 ...	301
Ali Muhamad v. Vadi Lal, 21 Bom. L. R. 849 ...	139
Allahabad Bank v. Murliddar, 34 All. 442: 9 A. L. J. 577	161
Allahabad Trading and Banking Corporation v. Gulam Muhammad, 37 All. 383	199
Allan Bros v. Shaik Jooman, 85 I. C. 291 ...	18, 30
Allen v. Bonnet, 1870, 5 Ch. App. 577 ...	44
Allen <i>Exparte</i> , <i>Re.</i> , Fussell, 1882, 20 Ch. D. 341 ...	134

	PAGE.
Alsagir v. Currie, 1844, 12 M. & W. 751	195
Alterson v. Vernon, 1890, 3 Term. Rep. 539	60
Alu Hazi Sullaiman v. Hazi Jun Muhammad, 8 Bom. L. R. 648	46
Amathlal v. Cursetji, 9 Bom. L. R. 466	161, 162
Ambors Summers, <i>In the Matter of</i> , 23 Cal 592	41
Amirudi v. Jadar, 19 C. L. J. 430 (27 Bom. 399 referred to)	224
Amolak Chand v. Mansukhari Mangan Lal, I. L. R. 3 Pat. 857: 1925 A. I. R. (P) 127: 85 Ind. Cas. 88	14, 124
Amrita Lal Ghose v. Narain Chandra Chakravarti, 30 C. L. J. 515	119, 149, 243, 244, 258
Amunagiri v. Kandaswami, 83 Ind. Cas. 955	297
Ananda v. Ganesh, 40 Cal. 678: 21 Ind. Cas. 969	257, 271
Anandji Damadar v. James Finlay & Co., 62 Ind. Cas. 441	278, 301
Ananta Narayana Iyer v. Sankara Narayana, 47 Mad. 673: 79 Ind. Cas. 395: 1924 A. I. R. (M) 345	223, 237, 275
Anant Ram v. Vetlah, 34 Ind. Cas. 829	212
Anant Ram v. Yusoof, 36 Ind. Cas. 903	223
Anant Singh v. Kalka Singh, 5 O. L. J. 664: 48 Ind. Cas. 526	13, 94, 123
Andrew Rozario v. Muhammad Ebrahim Serang, 48 Bom. 583: 26 Bom. L. R. 695	141
Angappa Chetty v. Nanjappa, 18 M. L. J. 189: 2 M. L. T. 57	234
Anilabala Chaudhurani v. Dharendra Nath Saha, 32 C. L. J. 314	71
Anna Latesia De Silva v. Govind Balvant Parasher, 22 Bom. L. R. 987: 58 Ind. Cas. 411	259
Annamalai Chettiar, 73 Ind. Cas. 213: 1923 A. I. R. 487 (Mad.)	91, 243, 248, 191
Annamalai Chetty v. Official Assignee. Aadras, 1925, A. I. R. (M.) 243	301
Anaji v. Ratanji, 21 Bom. 313	128
Anup Kumar v. Kesho Das, 39 All. 547	20
Anupaswami v. Maniham, 9 Mad. 103	17
Appi Reddi v. Appi Reddi, 45 Mad. 189: 41 L. J. 606: 1921 M. W. N. 816: 14 L. W. 639	110, 215, 221
Archer, <i>Re</i> , 20 T. L. R. 390	165
Archibald Gilchrist Peace, <i>Re</i> ., 26 C. W. N. 653	204, 267
Arman Sardar v. Satkhira Jt. Stock Co. Ltd., 18 C. L. J. 564	79, 127
Armitaga, <i>Ex parte</i> , 17 Ch. D. 13	257, 300
Arnavyl, <i>In Re</i> ., 21 Bom. 227	29
Arunchala V. Ayyavu, 7 Mad. 318	168
	161, 162

Aruna Chellam v. Maung Po. Thin, 9 Ind. Cas. 461	
Arungiri Mudaliar v. Kandaswami Mudaliar, 83 Ind. Cas. 955	37, 114, 188
Asghari Begum v. Muhammad Yusooif, 61 Ind. Cas. 534	131
Ashrafuddin v. Bepin Behari, 30 Cal. 407	161
Assomal, Application of, <i>In Re.</i> 4 S. L. R. 222: 9 Ind. Cas. 724	173
Avanashi v. Muthulkruppam, 34 M. L. J. 319:	
1918: M. W. N. 345: 44 Ind. Cas. 885	279
Aziz-un-nissa Bibi v. O. M. Chiene, 42 All. 593	140

B

Babu Lal Sahu v. Krishna Prasad, I. L. R. 4 Pat. 128: 85 Ind. Cas. 543	163, 200
Badcock, <i>Re.</i> 1886, 3 Morr. 138	179
Badre Narain v. Sheo Koar, 17 Cal. 512: 17 I. A. 1 (P.C.)	38
Badri Das v. Chetty, 45 Ind. Cas. 918	198
Baker v. Lloyds Bank, Ltd. 1920 L. R. 2 K. B. 322	194
Balaji v. Ramchandra, 19 Bom. 660	258, 260
Baldeodas v. Sukhdeodas, 19 All. 125: 21 A. W. N. 97	109
Ballav Chand Serowgee, <i>In Re.</i> 27 C. W. N. 739	81, 110, 164, 165
Balmokand v. Ayya Sing, 18 P. W. R. 1912: 26 P. L. R. 1912: 13 Ind. Cas. 68	234
Banarasi Das v. Baldeo Das, 82 Ind. Cas. 742 (1925) A. I. R. (O) 222	48
Banarasi Das v. Banarasi Das, 9 A. L. J. 233: 14 Ind. Cas. 416	105
Banker v. Burdekin, 1843, 11 M. & W. 128	41
Banker, <i>Re.</i> , <i>Ex parte</i> Constable and Jones, 1890, 25 Q. B. D. 285	179
Bank of Upper India v. The Administrator General of Bengal 45 Cal. 653 (664)	107, 198, 266
Bankruptcy Notice, <i>In Re.</i> (1924) 2 Ch. D. 76	158
Bansidhar v. Kharasjit, 37 All. 65	26, 35, 245
Bansidhar Khetry, <i>In the Matter of</i> , 2 Cal. 359	119
Bansilal Agarwal v. Rangalal Agarwal, 1923 A. I. R. 97 (Nag.)	222, 224
Bappu Rediar v. Official Assignee, Tinnevely (1919) M. W. N. 576: 37 M. L. J. 246	232
Baranashi Koer v. Bhabadeb Chatterjee, 34 C. L. J. 169	160, 200, 308
Barker v. Goodair, 11 Ves 78	11
Barra Begum v. Babu Sheo Narain, 1923 A. I. R. 293 (All.)	26, 277

	Page.
Barrel, <i>Exparte</i> , 34 L. J. 41	196
Bartley v. Hedges, 1861, 30 C. L. Q. B. 352	169
Basanti Lal v. Cheddi Singh, 39 Cal. 1048: 16 C. W. N. 664	93
Basarmal v. Khemchand, 11 Ind. Cas. 433	210
Bashyam Reddi v. Somasundaram, 32 Ind. Cas. 897	90
Basodi v. Lal Muhammad, 13 N. L. R. 210	245
Bath, <i>Exparte</i> , <i>Re</i> . Philipps, 1882, L. R. 22 Ch. D. 450	203
Battams, <i>Exparte</i> , (1900) 2 Q. B. 698	56
Bawan Dass v. O. M. Chiene, 44 All. 316: 20 A. L. J. 155	122
Baxtor v. Nichol, 4 Taunt, 90	192
Beardsel & Co., v. Abdul Guni, 37 Mad. 107	252
Beardsel, W. A. & Co., v. Nilagiri, 11 M. L. T. 391	256
Beauchamp, <i>Exparte</i> , 1894, 1 Q. B. 1	56
Bebro, <i>Re</i> , 1900, 2 Q. B. 316	83
Behari Lal v. Sat Narain, 1. L. R. 3 Lahore, 329	14, 123, 124
Beharilal Sikdar v. Harsookdas Chakmall, 25 C. W. N. 137: 61 Ind. Cas. 904	83, 156, 158, 160 167, 175, 205
Bekham v. Drake, 2 D. L. C. 579	223
Basiruddin v. Mokima Bibi, 22 C. W. N. 709	261
Bengal Bankin Corp. v. Mackertich, 10 Cal. 315	16
Beni Madhab v. Kumud Kumar, 30 Cal. 123: 6 C. W. N. 799	112
Benson, <i>In Re</i> . Bower (1914) 11 Ch. 68	308
Betts, <i>In Re</i> ., (1901) 2 K. B. 39	80, 90, 105, 110, 165
Bhagwan Das v. Chutan Lal, 19 A. L. J. 240: 62 Ind. Cas. 732	230, 233, 238
Bhagwan Das, <i>In Re</i> ., 4 Bom. 48	299
Bhagwat Kishore v. Sanwal Das, 19 A. L. J. 701: 61 Ind. Cas. 802	297, 286
Bhagwat v. Munin Khan, 8 Ind. Cas. 1115: 6 N. L. R. 146	147, 225
Bhairo Pershad v. S. P. C. Das, 17 A. L. J. 787: 51 Ind. Cas. 113	279
Bhavan Mulji v. Kavasji, 2 Bom. 542	134
Bhubon Mohan Bose, <i>In the matter of</i> , 15 W. R. 571	93
Bhut Nath v. Biarj Mohini, 28 C. L. J. 536: 49 Ind. Cas. 87	217
Bibee Tokaisherob v. Davod Mullick, 6 M. I. A. 510	10
Bidhatadin v. Jaganath, 9 A. L. J. 699	109
Bills v. Smith, 34 L. J. Q. B. 68	235
Binda Prasad v. Ram Chandra, 19 A. L. J. 277	247
Bishambernath v. Rukha, 81 Ind. Cas. 647	17, 199, 267
Bishop v. Church, 3 Atk. 691	193
Blackburn, <i>Exparte</i> , (1871) L. R. 12 Eq. 358	231

	PAGE.
Blackman, <i>Re. Exparte Branfill</i> , 1892, 9 Morr. 157	88
Blackpool Motor Co. Ltd., <i>In Re.</i> 1901, 1 Ch. 77 ...	157
Board of Trade, <i>Exparte, Re. Moulton</i> , 1890, 8 Morr. 1	271
Bolai Chand Datta, <i>In the matter of</i> , 20 Cal. 874	100
Bolisetti Momayya v. Kolla Kotayya, 44 Mad. 810:	
40 M. L. J. 570: 1921 M. W. N. 330: 29 M. L. T.	50, 56, 58, 84,
288: 14 L. W. 428: 63 Ind. Cas. 916 ...	234
Bombay Saw Mills Co. Ltd., <i>In Re.</i> , 13 Bom. 314 ...	18
Bond, <i>Re.</i> , 1888, 21 Q. B. D. 17 ...	90, 105
Bower, <i>In Re.</i> , v. Chetwynd (1914) 2 ch. 68 ...	159
Bower v. Hett (1895) 2 Q. B. 51 ...	208
Braginton, <i>Re.</i> , 14 L. T. 277 ...	186
Brake v. Beekham, 60 R. R. 691 ...	7
Branson, <i>In Re.</i> , 1914 2 K. B. 701 ...	. 132, 258
Bray v. Fromant, 22 R. R. 224 ...	12
Brett, <i>Exparte, Re. Howe</i> , 1871, 6 Ch. App. 838	63
Brickband v. Newsome, 1835, 2 Mont & A. 283 ...	58
Brickwood v. Miller, 3 Mar. 279 ...	11
Bright, <i>Re.</i> , 1903, 1 K. B. 735 ...	164
Brij Kishore Lal v. Official Assignee, Madras, 43 Mad. 71: 37 M. L. J. 244 ...	167, 175
Brij Mohan, <i>In the matter of, v. Bungshidhar</i> , 2 C. W. N. 335 ...	44
Brij Mohan Dobey, <i>In the matter of</i> , 2 C. W. N. 306 ...	48
Brinsmead v. Harrison, 1871 L. R. 6 Ch. Prac. 584	148
Bristow v. Whitmore, (1859) 4 De & J. 325 ...	19
Brown, <i>Exparte</i> , 11 Ch. D. 148 ...	29
Brown, <i>Exparte</i> , 1832, 1 Deac & Ch. 118 ...	59
Brown v. Fergusson, 16 Mad. 499 ...	45
	154
Brown and Wingrove, <i>Re., Exparte Ador</i> , 1891, 2 Q. B. 574 ...	193
Buchan v. Hill (1888) W. N. 233 ...	129
Budhu Koer v. Hafiz, 18 C. L. J. 274 ...	3
Bulmer v. Hunter, 1869 L. R. 8 Eq. 46 ...	216
Bumpus, <i>Re., Exparte White</i> , 1908, W. N. 90 ...	147
Burlinson v. Hall, 12 Q. B. D. 347 ...	16
Burnett, <i>Re.</i> 1 Bons. 89 ...	166
Butcher v. Stead, 7 Eng. & Ir. App. 849 ...	45, 219, 239
Buxton v. Bangham (1834) 6 C. & P 674 ...	18

C

Cairney v. Back, 1906, 2 K. B. 746. ...	266
Callender Sykes & Co., v. Colonial Secretary of Lagos and Davies, 1891 A. C. 460 ...	169

	PAGE.
Campbell, F. F. & Co., v. Mithomal Dwarkadas, 9 S. L. R. 65	218
Cambell, <i>In Re</i> , 1884, 14 Q. B. D. 32	301
Canthom, <i>In the matter of</i> , 33 Mad. 53	194
Chalamanpa v. Subramma, 7 Mad. 23	17
Chand, J. v. Aba, 5 Bom. 132	267
Chandan Lal v. Khem Raj, 15 A. L. J. 538: 40 Ind. Cas. 156	174
Chandra Binode v. Sheikh Ala Baksh, 24 C. W. N. 818 F. B.	261
Chandra Kumar De v. Kusum Kumari Roy, 28 C. W. N. Cl xxxvi: 40 C. L. J. 180: (1925) A. I. R. (C) 57	18, 35
Channu Lall v. Luchman Sonar, 39 All. 391	220
Chaplin, <i>Ex parte</i> , <i>Re</i> ., Sinclair. 1884, 36 Ch. D. 319	43
Charri, <i>In Re</i> ., 2 Mad. 13	157
Charu Chandra v. Hem Chandra, 47 Ind. Cas. 72	278
Chatrapat Singh Dugar v. Kharag Singh Luchmi-38, 53, 67, 103, narain, 40 Cal. 685: 17 C. W. N. 752: 21 C. 104, 108, 165, W. N. 497	284, 301
Chatti v. Subramma, 7 Mad. 23	16
Chaturbhuj v. Harlall (1925) A. I. R. (Cal.) 335: 80 I. C. 858	23, 298
Chavadi Ramasami Pillai v. Venkatesware Aiyar, 42 Mad. 13: 35 M. L. J. 531: 48 Ind. Cas. 952	62 302, 307
Chellaram v. Official Receiver, 1923, A. I. R. 20 (Sind)	14, 94, 123
Chengalvaroya v. Official Assignee, Madras, 33 Mad. 467: 7 M. L. T. 207	194
Chetan Das Mohan Das v. Ralli Brothers 83 Ind. Cas. 135	61, 73, 194
Chetti v. Ba Tin, 13 Bur. L. T. 117: 61 Ind. Cas. 640	157
Chidambaram Chettiar, v. Sami Aiyar, 30 Mad. 6	219
Chidambaran v. Nagappa, 38 Md. 15: 24 M. L. J. 73: 16 Ind. Cas. 820	299, 311
Chidamvaram Chetty v. Srinivasa Sastri, 30 Mad. 6: 18 C. W. N. 841	45
China Subraya v. Kudaswami Reddi, 1 Mad. 59.	199
Chinna v. Kumar, 36 Ind. Cas. 906	179, 221
Chiranjilal v. Emperor, 12 A. L. J. 1105: 25 Ind. Cas. 686	298
Chota Lal v. Kedar Nath, 84 Ind. Cas. 289	140, 240
Chowdhri Gur Narain v. Sheo Lal Sing, 46 Cal. 566: C. W. N. 521	6
Chowdhury Sharf-uz Zaman v. Deputy Commission- er, Barabanki, 79 Ind. Cas. 888	219
Chugmull v. Jainarain, 15 C. L. J. 238: 16 C. W. N. 80n	298

	PAGE.
Chundra Narain Sing v. Kishen Chand Golicha, 9 Cal. 855	199
Chunilal v. Biharilal, 21 P. W. R. 1916: 38 Ind. Cas. 995	3
Chunilal Oswal, <i>In the matter of</i> , 29 Cal. 503 ...	161
Clarke, <i>Exparte</i> , 1 Dea. & Co.. 544	58
Clay, <i>Re.</i> , <i>Exparte</i> the trustee, 3 Mans. 31 ...	235
Coates, <i>Exparte</i> , <i>Re.</i> , Skelton, 1877, 5 Ch. D. 979 ...	45, 46
Cobbold, <i>Re.</i> , 36 Cal. 512	269
Cochrane, <i>Exparte</i> , L. R. 20 Eq. 282	274
Cockerell, R. H. & ors v. Theodore Dickens, 2 M. I. A. 353	208
Cohen v. Mitchell	139, 140
Colonial Bank v. Whitney, 1885, 30 Ch. D. 261 ...	134, 136, 137
Cook v. Charles, A. Vogelar, 1901 App. Cas. 102 ...	42
Coombes, <i>Exparte</i> , 1877, 5 Ch. App. 979 ...	164
Cooper v. Prichard, 11 Q. B. D. 351	190
Courtis, <i>Exparte</i> , <i>Re.</i> , Courtis, 1893, 9 T. L. R. 387	46
Cowasji Polkerji, <i>In Re</i> , 13 Bom. 114	117, 283
Cowie, <i>Re</i> . 5 Cal. 70	185
Crackwell v. Janson, 6 Ch. D. 745	200
Crawford, <i>Re.</i> , 1887, 6 Ch. D. 29	216
Crispin, <i>Exparte</i> , 1873, 8 Ch. App. 374	42
Crostray v. Collins, 15 Ves. 218	11
Cronmire, <i>Re Expart</i> Cronmire, 1894, 2 Q. B. 246 ...	96
Cunhan v. Bank of Madras, 19 Mad. 234	18

D

Daalat v. Panduram, 55 Ind. Cas. 67	230
Dadapa v. Bishnudas, 12 Bom. 424	45, 230
Daintry <i>Re. Exparte</i> Holt, 2 Q. B. D. 116	47
Dambar Singh v. Munwari, 15 A. L. J. 877	245
Damodar v. Atmaram, 8 Bom. L. R. 344	19
Dan Rylands, <i>Exparte v. Re. Collier</i> , 1891, 64 L. T. 741	58
Dan Rylands Ld., <i>Exparte</i> , <i>Re. Collier</i> , 1891, 8 Moor. 80	77
Daryai Singh v. Kunj Lal, 75 Ind. Cas. 995	222, 227, 237
Dasugopal v. Bhanji, 26 Bom. 171	85
Dataram v. Deoki Nandan, 58 Ind. Cas. 6	279, 280
Davies, <i>In Re.</i> , 1921, 3 K. B. 628	240
Davies, <i>Re. Exparte</i> King, 1876, 3 Ch. D. 461 ...	107
Debendra Sikdar v. Pursotam Das, 55 Ind. Cas. 186	42, 48, 309
Debi Pershad v. O. M. Cheine, 16 Ind. Cas. 84: 9 A. L. J. 797	210
Debi Prasad v. Allen Grant, 39 Ind. Cas. 916	181

	PAGE.
Debi Prasad v. Staneelay Ray, 6 A. L. J. 483: 2	
Ind. Cas. 223	23
Debi Prasad v. Jumna Das, 23 All 56	298, 299
Debtor, a, <i>In Re.</i> , 1922	77
Deen Doyal v. Jugdeep Narain, 3 Cal. 198	94
Derasami v. Vaithilinga, 40 Mad. 31 (F. B.):	
1917 M. W. N. 353: 32 H. L. J. 422	6
Des Raj v. Dunichand, 60 Ind. Cas. 588	132
Desraj v. Sagarmull, 38 All. 37	230
Devaswami, M. v. Minakshisundara, 16, M. L. T.	
246	280
Devadass Premchand v. Soleti Gopalappa, 45	
M. L. J. 689: 1923 M. W. N. 754: 18 L. W.	
75 I. C. 876: 1924 A. I. R. Mad. 398	21, 23
Devi Dial v. Sundar Das, 51 Ind. Cas. 720: 65	
P. R. 1919	236
Devi Prasad v. J. A. N. Lewis, 16 A. L. J. 107	120
Devi Prasad v. Secretary of State, 21 A. L. J.	
454	78, 94, 126
Dholan Das. In the the Application of. to declare	
the firm of Walbdas Holaram insolvents, 56	
Ind. Cas. 158	46, 60, 157
Dewcurn Jewraj, <i>In Re.</i> , 12 Bom. 342	206
Dewdney, <i>Exparte</i> , 1885, 15 ves. 479	160
Dialsha v. Miranbaksh, 23 P. L. R. 1917: 39 Ind.	
Cas. 745	105
Dickin, <i>Exparte</i> , 8 Ch. D. 377	29
Digendra Chandra Basak v. Ramani Mohan	
Goswami, 22 C. W. N. 958: 48 Ind. Cas.	
33	22, 383
Din Dayal Lal v. Jugdup Narain Singh, 4 I. A.	
247: 3 Cal. 198 P. C.	10, 12
Din Doyal v. Gursaran Lal, 42 All. 336: 18 A. L. J.	
287: 59 Ind. Cas. 67	210
Dinonath v. Hogg, 2 Hay, 395	248
Dost Muhammad Khan v. Manick, 29 All. 537	266
Doulat Ram v. Deoki Nandan, 75 Ind. Cas. 861:	
1924 A. I. R. (L) 686	229
Downman, <i>Exparte</i> , 1863, 32 L. J. 49	186
Drabamoya v. Davies, 14 Cal. 323	260
Draupadi Bai v. Govind Singh, 65 Ind. Cas. 334	129, 214
Draupdi v. Hiralal, 34 All. 496: 10 A. L. J. 3	36, 302, 307
Dronadula v. Ponakavira, 45 M. L. J. 105: 1923	
M. W. N. 306: 72 Ind. Cas. 805: 1923 A. I. R.	28, 215, 216,
(Mad.) 641	220
Duce and Duce, 1889, 6 Morr. 290	190
Duni Chand v. Muhammad Hossain, 40 Ind. Cas.	
770: 22 P. R. 1917: 14 P. W. R. 1917	278

Duraiyya Solagan v. Venkataram Naicker, 60 Ind. Cas. 123	226
Dutton v. Morrison, 1810, 7 Ves. 194	42, 43
Dwarika Mohun Das v. Lukhimony Dasi, 14 C. 384	10, 12
Dwarkadoss, <i>In Re.</i> 17 Bom. L. R. 925	132
Dwarka Nath Mitter, <i>In Re.</i> 3 Cal. 58	134

E

East India Cigarette Mfg. Co., Ltd. v. Anando Mohun Basak, 24 C. W. N. 401	301
Ebrahim Khan v. Rangswami Naicker, 28 Mad. 420	266
Edgcombe, <i>Re. Ex parte</i> , Edgcombe, 1902, 2 K. B. 403	150
Edward v. Ramdin, 14 C. W. N. 170	195
Elliot, <i>Ex parte</i> , 1873, 2 Dea. 179	160
Emerson, <i>Ex parte</i> , 41 L. J. (K. B.) 20	135
Emma Silver Mining Co. v. Grant, 1889, 17 Ch. D. 122	190
Entazuddi v. Ramkrishna, 24 C. W. N. 1072	261
Erskine, <i>Re. Ex parte</i> , Erskine, 1893 T. L. R. 32	72
Evelin, <i>Re. Ex parte</i> , General Public Works and Assets Co., 1894, 2 Q. B. 302	142

F

Fakir Chand v. Motichand, 7 Bom. 438	86, 122
Farnham, <i>In Re.</i> , 1895, 2 Ch. D. 800	226
Fatima v. Fatima, 16 Bom. 452	139
Fiddian, <i>Re. Ex parte</i> , Fiddian, 1892, 9 Morr. 65	46
Fink v. Maharaja Bahadur, 26 Cal. 772	208, 259
Fisher v. Boucher. 1830, 10 B. C. 705	46
Fleming shah & Co., <i>In the Application of Messrs.</i> 35 Ind. Cas. 539	82, 174
Flower v. The Mayor of Lymeregis (1921) 1 K. B. 488	170, 176
Foster, <i>Ex parte</i> , 1810, 7 Ves. 414	46
Fox v. Hunbury, Comp. 445	11
Fresency v. Wells, 1857, 26 L. J. C. P. 129	133

G

Gadiji Mudappa v. Parameswara Bhat, 1925 A. I. R. (Mad.) 242: 85 Ind. Cas. 303	82
Ganeshdas Pandalar, <i>In Re.</i> 32 Bom. 198	117, 283
Gangadhar v. Sridhar, 61 Ind. Cas. 489	27, 38, 299
Ganga Pershad v. Feda Ali, 48 Ind. Cas. 913	160
Gangaram v. Ramchandra, 9 N. L. R. 91: 20 Ind. Cas. 250	68

	PAGE.
Ganoda v. Buttokristo, 30 Cal. 1040: 10 C. W. N. 857	190
Gantu Appa Reddi v. Gantu China Appa Reddi, 1921, M. W. N. 816: 45 Mad. 189	53
Garner, <i>Exparte</i> , 1812, 1 Ves. & B. 45	45
Gaskill, <i>Re</i> . 1904, 2 K. B. 478	179
Gaulstaun, J. C. v. Umesh Chandra Banerjee, 25 C. L. J. 303	209
Gaura v. Nawab Mohammad, 64 Ind. Cas. 523	27, 225
Geisel, <i>Exparte</i> , 1882, 22 Ch. D. 436	164
Ghansamdas v. Bishindein, 5 S. L. R. 259: 15 Ind. Cas. 830	73
Ghansyam v. Maroba, 18 Bom. 474	303
Ghulam Muhammad v. Panna Ram, 72 Ind. Cas. 433	147, 225
Gillmore v. Bulackilal, 19 P. R. 1900	105
Gill, <i>Re</i> . 1888, 5 Morr. 272	166
Girdharilal v. Saratkissen, 138 P. W. R. (1918) 667	223
Girish v. Anundo, 15 Cal. 66	16
Girish Chandra Ghose v. Kishori Mohan Das, 23 C. W. N. 319	88
Girwadhari v. Joy Narain, 32 All. 645	36, 52, 105, 107
	108
Gladstone Wyllie v. Umesh Chandra Chatterjee, 25 W. R. 96	51
Gobind v. Gopal, 9 N. L. R. 182	33, 254, 257
Gobind v. Paresh, 25 Bom. 161	16
Gobind Das, v. Karamji, 40 All. 197	121, 254
Gobind Prasad Gir, v. Kishan Lal, 1924 A. I. R. (Pat.) 166	65
Gopal v. Bank of Madras, 16 Mad. 397	45, 219
Gopal v. Ramkrishna, 62 Ind. Cas. 289	223
Gopal Rao v. Hiralal, 83 I. C. 246: 1925 A. I. R. (N) 225	224, 237
Gopeswar v. Jibanchandra, 41 Cal. 1125: 18 C. W. N. 804: 19 C. L. J. 549	3
Gopinath Chaudhuri, v. Binodilal Rai Chudhuri, 31 Cal. 162	93
Gopinath v. Guru Prashad, 15 Ind. Cas. 860	144, 201
Goswami Giridhari v. Govardhanlalji, 18 Bom. 294 P. C.	271
Gordon, <i>Re</i> ., <i>Exparte</i> Official Receiver. 1889. 6 Morr. 115	142
Gour Charan, Ganga Charan Shah v. Toyabuddin Ahmed, 23 C. W. N. 461	208, 210
Gouri Dutt v. Shanker Lal, 14 All. 358	132
Governor of Bengal v. Motilal Ghosh, 41 Cal. 173: 18 C. L. J. 452: 17 C. W. N. 1253	249
Govinda v. Abdul Kadir, 1923 A. I. R. 150 (Nag) 121, 143, 197, 250	

	PAGE.
Govind Ram v. Kunj Behari Lall, 22 A. L. J. 217	117
Greaves, C., <i>Re. Re. W. H. Greaves, Exparte</i>	
Official Receiver, 1904, 2 K. B. 493	84
Grey v. Ugramohan, 28 Cal. 790	248
Griffin, <i>Exparte</i> , 12 Ch. D. 480 (1879)	80
Gubbay Miller, <i>In Re.</i> 6 Cal 633: 7 B. L. R. 29	134
Gujar Shah v. Barkat Ali Shah, 56 Ind. Cas. 744	286
Gunsbourg, <i>In Re.</i> 1920, L. R. 2 K. B. 426	148

H

Hafez v. Damodar, 18 Cal. 242	208
Haji Jackeria v. Selha, 12 Bom. L. R. 27	278
Haji Umar v. Jwala Prasad, 79 Ind. Cas. 662: 1924	
A. I. R. (Nag) 300	131, 149
Halfhide v. Halfhide, 50 Cal. 867	98, 150, 157, 191
Hall, <i>Exparte</i> , L. R. 19 Ch. D. 480	234
Hall, <i>Exparte. Re.</i> , Whitting, 1870, 10 Ch. D. 615	138
Hamida Rahaman v. Jamila Khatun, 34 C. L. J.	
123	258
Hance v. Hardinge, (1888) 20 Q. B. D. 782	220
Hancock, <i>In Re.</i> (1904) 1 Q. B. 585	165
Hansom, <i>Re.</i> , <i>Exparte Frester</i> , 1887, 4 Marr. 98	61
Hanuman Prasad Narain Singh v. Harakh Narain,	
42 All. 142: 58 Ind. Cas. 551	79, 127
Haramohun v. Mohandas, 39 C. L. J. 433: 1924 A.	
I. R. (Cal.) 849	243, 254
Harapriya Debya v. Shama Charan Sen, 16 Cal. 592	144, 161, 162,
	191, 198 204
Hari Charan v. Birendra Nath, 35 C. L. J. 327	208
Haridas Kundu v. J. C. Mc. Gregor, 18 Cal. 477	260
Harihar Banerji v. Ramshoshi Rai, 23 C. W. N. 77:	
29 C. L. J. 117	88
Harihar v. Maheswar, 18 C. W. N. 692	282
Hari Lal Mullick, <i>In the Matter of</i> , 33 Cal.	
1269: 10 C. W. N. 884	203
Haripada v. Anath De, 22 C. W. N. 758: 44 Ind.	
Cas. 211	19
Harman v. Ganpat, 73 Ind. Cas. 367 (Lahore)	26, 277
Harnam Das v. Faiyazi Begum, 20 A. L. J. 172	127
Har Prasad v. Ram Swarup, 82 Ind. Cas. 340	196
Harris v. Rickett, 1859, 28 L. J. (Q. B.) 197	43
Hart v. Taraprasunno Mukherjee, 11 Cal. 718	47
Harya v. Mulchand, 64 P. R. 1907: 89 P. W. R.	
1908	162
Hasluck v. Clark (1899) 1 Q. B. 699	138
Hasmat Bibi v. Bhagwan Das, 36 All. 65	36, 93, 120
Hassambhoy v. Cowasji, 7 Bom. 1.	249
Hawkins, <i>Re, Exparte, Hawkins</i> , 1891, 1 Q. B. 25	98

	PAGE.
Hazi Essack v. Shaikh Abdul Rahaman, 17 Bom. L. R. 989: 40 Bom. 461: 31 Ind. Cas. 507	152
Heap, <i>Re</i> , <i>Ex parte</i> , Board of Trade, 4Morr. 314	185
Heather and Son v. Webb, 1876, 2 C. P. D. I. ...	179
Hemraj v. Ramkrishna (1916) 2 P. L. J. 101 ...	53, 110, 215, 223, 227, 236, 237
Henley & Co., <i>In Re</i> . (1878) L. R. 9 Ch. D. 469 ...	265
Henry Robert Smith, <i>Re</i> . Application by, 9 S. L. R. 132: 32 Ind. Cas. 575	179
Hequard, <i>Ex parte</i> , 1889, 24 L. B. D. 71	72
Higgison and Deal <i>Re</i> . 1899, 1 Q. B. 325	156
Hill, <i>Ex parte</i> , 23 Ch. D. 695	231
Hindley, C. D. M. v. Joy Narain Marwari, 24 C. W. N. 288	78, 79, 94, 126, 139, 141
Hira Lal v. Tulsī Ram, 80 I. C. 946	98, 130, 152, 156, 160
Hirst, <i>Ex parte</i> , <i>Re</i> . Wherly, 1879. 11 Ch. D. 278	142
Holderness v. Shackles, 8 B. & C. 612	11
Holland, <i>In Re</i> . 1920, 2 Ch. 360	240
Hormusji Ardesir, <i>In Re</i> . 17 Bom. L. R. 313	184, 186
Horn v. Baker, 1808, 2 Smith's Leading Cases. 11th Ed. 232	134
Horukchand Golicha, <i>In Re</i> , 5 Cal. 605: 6 C. L. R. 282	43
Howard Bros. <i>In Re</i> . 11 B. L. R. 254	70
Howatson, W. E. V. Durrand, W. E., 27 Cal. 351: 4 W. N. 610	122
Hubert v. Sayer, 5 Q. B. 965	139
Hukumat Rai v. Padam Narain. 39 All. 353	26, 30, 279
Hunseswar v. Rakhai 18 C. W. N. 366	243, 246, 274, 278, 280, 296
Hunt, <i>In Re</i> . 1 B. H. C. R. 251	259
Hurmukh Roy Munno Lal v. Radha Mohan. 54 Ind. Cas. 931	14, 95, 122
Husaini v. Muhammad Zamir Abedi, 74 Ind. Cas. 802	217, 261, 279
Hutton, <i>Re</i> . 1872, 7 Ch. App. 723	173

I

Ijaz Hussain v. Lachman Das, 75 Ind. Cas. 790: 1924 A. I. R. (Oudh) 351	158
Imbiohi v. Achampat, 35 M. L. J. 58	16
Indian Specie Bank v. Nagin Das Hurjivan Das, 18 Bom. L. R. 689: 35 Ind. Cas. 628	61
Irshad Hussain v. Gopi Nath, 17 A. L. J. 317: 49 Ind. Cas. 590	26, 204, 279
Issac Shrager, <i>In Re</i> . 33 Cal. 1062.	304
Iswar Das v. Ladha Ram, 62 Ind. Cas. 924	216, 222, 297

	PAGE.
Izard, <i>Ex parte</i> , <i>Re</i> . Cook, 1874, 9 Ch. App. 271 ...	43
Iyappa v. Manick Ansari, 40 Mad. 603 F. B. ...	297

J

Jackson, <i>Ex parte</i> , 20 W. R. 1023 ...	157
Jadu Nath Halder v. Manindra Nath Chandra, 27 C. W. N. 816 ...	235
Jagabhai Lallubhai v. Vijbhukandas, 11 Bom. 37 ...	123
Jagannath v. Gangadutt Dobay, 41 All. 486: 17 A. L. J. 565 ...	53, 103
Jagannath v. Lachmandas, 12 A. L. J. 889 ...	221
Jagannath Marwari v. Kalachand Banerjee, 41 C. L. J. 290: 29 C. W. N. 771: 86 I. C. 1042 ...	142, 198, 254, 260
Jagannath v. Narain, 52 Ind. Cas. 761 ...	237
Jagat Chandra Roy v. Issur Chandra Roy, 20 Cal. 693 ...	10, 13
Jagat Tarini v. Nabogopal, 34 Cal. 305: 5 C. L. J. 270 ...	259
Jaggannath Thirans v. Taraprasanno, I. L. R. 3 Patna, 74 ...	127, 141
Jagmohan Narain v. Grish Babu, 42 All. 515: 18 A. L. J. 611: 58 Ind. Cas. 557 ...	56, 164
Jagmohan Sing v. Deputy Commissioner, Fyzabad, 80 Ind. Cas. 54 ...	185
Jagrup Sahoo v. Ramanand, 15 A. L. J. 738: 39 All. 633 ...	246
Jainab Bibi, v. Hyder Ally, 43 Mad. 609 ...	215
James, <i>Ex parte</i> , 8 Morr. 19 ...	181
James Young and ors. v. Bank of Bengal. 1 M. I. A. 87 ...	195
Jam Khan v. Debi Dutt, 77 P. W. R. 1915: 29 Ind. Cas. 888: 152 P. L. R. 1915 ...	166
Jangi Lal v. Laddu Ram, 1919 Pat (F. B.) 105 ...	226
Janki Prasad v. Gridharilal, 16 O. C. 68: 19 Ind. Cas. 704 ...	56
Janki Ram v. Official Receiver, Coimbatore, 78 Ind. Cas. 16: 1925 A. I. R. (M) 329 ...	232
Jeer v. Rangaswami, 36 Mad. 402 ...	67, 77, 88, 105, 108
Jeevanji Mamooji v. Ghulam Gussain, 12 S. L. R. 20: 47 Ind. Cas. 771 ...	132
Jemnadas 40 Cal. 78 ...	169
Jivandas Jhawar, <i>In Re</i> . 40 Cal. 78: 18 Ind. Cas. 908 ...	239, 305, 304
Jewan Ram v. Ratan Chand, 70 Ind. Cas. 498: 26 C. W. N. 285 ...	10, 13
Jhabba Lal v. Shib Charan Das, I. L. R. 39 All. 152 ...	278, 296

xxxviii . PROVINCIAL INSOLVENCY ACT, 1920.

PAGE.

Jitendra Nath v. Fateh Singh Nahar, 26 C. W. N. 921 : 72 Ind. Cas. 320	...	...	33
John Brown & Co. <i>Re.</i> 1906, 22 T. L. R. 291	...	...	186
Johnson, <i>Ex parte</i> , v. Lasceles, 1894 App. Cas. 135	...	...	44
Johson v. Hill (1822) 5 Stock 172	...	...	19
Johnson, <i>Re.</i> : Golder v. Gillam, L. R. 20 Ch. D. 389	...	...	219
Jokham Sing v. Deputy Commissioner of Fyzabad, 23 Ind. Cas. 924	...	...	147
Jones, <i>Re</i> , 24 Q. B. D. 589	...	...	181
Joseph Perry v. Official Assignee, Calcutta, 24 C. W. N. 425 : 31 C. L. J. 209 : 56 Ind. Cas. 778	...	...	288
Joy v. Campbell, 1804, 1 Sch & Lef. 328	...	...	134
Joy Chandra Das, v. Muhammad Amir, 22 C. W. N. 702	...	...	26
Judah v. Secretary of State, 12 Cal 445	...	...	190
Jugal Kishore v. Bankim Chandra, 17 A. L. J. 480 : 51 Ind. Cas. 192	...	...	199
Jugal Kishore v. Gur Narain, 33 All. 738	...	...	302, 307
Jugal Kishore v. Ishar Das, 63 P. R. 1919 : 51 Ind. Cas. 695	...	...	301
Jugalpada v. Ganes Chandra, 44 Ind. Cas. 168	...	...	226
Jukes, <i>In Re.</i> Official Receiver, 1902, 2 K. B. 58	...	...	230
Jumnadas v. Vinyak, 10 Ind. Cas. 698	...	...	8, 138
Jumai v. Muhammad Azim Ali, 25 All. 240 : 23 A. W. N. 11	...	...	68, 78
Jwala Nath v. Parbati Bibi, 14 Cal. 691	...	...	65, 103 109

K

Kadibhoy Ismailji Lotia, <i>In Re.</i> Messrs., 11 Ind. Cas. 14	...	...	8
Kalamalai v. South Indian Export Co., 33, Mad. 334 : 20 M. L. J. 211	...	...	43
Kali Charan Shaha v. Hari Mohon Basak, 24 C. W. N. 461 : 31 C. L. J. 206	...	...	50, 56, 84, 105
Kali Kissen v. Janki, 8 W. R. 250	...	...	263
Kalikumar Das v. Gopikrishna Ray, 15 C. W. N. 990	...	...	47, 52, 67, 109
Kalinath v. Ambica Prasad, 41, Ind. Cas. 399	...	...	228
Kalleappa Chetty v. Maung Kyme, 5 L. B. R. 189	...	...	186
Kalluri Venkataraman v. Official Receiver, 18 L. W. 610 : 1923 M. W. N. 780 : 76 Ind. Cas. 1006 : 1924 A. I. R. (M.) 358	...	...	219
Kalyanji v. Bank of Madras, 39 Mad. 693	...	...	48
Kamatchi v. Sundaram Aiyar, 26 Mad. 492	...	...	379
Kamini Kumar v. Hiralal, 23 C. W. N. 769	...	...	218
Kanhia v. Muhammed, 5 All. 11	...	...	16

	PAGE.
Kanhya Lal Mohan Lal of Amritsar, Firm of, v. Seth Radha Kissen, 112 P. L. R. 1913: 92 P. W. R. 1913: 18 Ind. Cas. 205 ...	202
Kanneappa Mudaly v. Raju Chettiar, 47 Mad. 605: 47 M. L. J. 16: 79 Ind. Cas. 850: 1924 A. I. R. (M.) 761 ...	143, 201
Karim Baksh v. Mahabir Bania, 12 Ind. Cas. 685	77
Karim Baksh v. Misri Lal, 7 All. 295	284
Karsandas v. Maganlal, 26 Bom. 476 ...	44
Kartar Devi v. Surasati; 9 P. R. 1908 ...	157
Karuthan Chettiar v. Raman Chetty, 79 Ind. Cas. 340: 45 M. L. J. 844: 1923 M. W. N. 746: A. I. R. (M.) 400 ...	286, 306
Kashi Nath v. Kanhya Lal, 37 All. 452 ...	210
Kasturchand v. Dhanpat Sing, 23 Cal. 26 (P. C.)	46, 48
Kaufman Segal v. Domb, <i>Exparte</i> , The Trustee (1923) 2 Ch. D. 89 ...	135
Kavali Sankara Rao v. Turlapati Ramakrishnayya, 46 M. L. J. 185: 78 Ind. Cas. 294: 1924 A. I. R. (M.) 461 ...	311
Keays, <i>Exparte</i> , Re, 9 Morr. 12 ...	186
Keene, In (1922) 2 Ch. D. 475 ...	8, 106, 120
Keene v. Thomas, (1905) 1 K. B. 136 ...	18
Kent, Re. 1905, 2 K. B. 666 ...	167
Kerakoose v. Benjamin Brookes, 14 M. I. A. 339 ...	138, 139
Keshoram v. Govind Ram, 1923 A. I. R. 142 (Nag.)	156
Ketaki Charan v. Sarat Kumari, 20 C. W. N. 995	6, 278
Khadir Shah v. Official Receiver, Tinnevely, 41 Mad. 30 ...	155, 205, 222
Khaira v. Salemraraj, 51 Ind. Cas. 985 ...	301
Khasim Hussain v. Bishan Sing, 14 Ind. Cas. 224	109
Khazano v. Bunwarilal, 19 A. L. J. 497 ...	32
Khelafut Hossain v. Ajmal Hossain, 54 Ind. Cas. 699 ...	130
Khetamal v. Chuni Lal, 2 All. 173 (180) ...	60
Khoo Kwat Siew v. Wooi Taik Hwat, 9 Cal. 224 (P. C.) ...	41
Khusali Ram v. Bholarmal, 37 All. 252 ...	26, 161, 221
Kilner, <i>Exparte</i> , Re. Barker, 1879, 13 Ch. D. 245	43
King Emperor v. Alexander, 25 Mad. 627: 12 M. L. J. 393 ...	263
King, <i>Exparte</i> , 3 Ch. D. 461 (1876): 20 Eq. 273 ...	80, 201
King, <i>Exparte</i> , Re. King, 1876, 2 Ch. D. 256 ...	43
King v. Henderson, 1898 A. C. 720 ...	112
King, the, v. Edward Fitzgerald, Duke of Leincester, (1924) 1 K. B. 311 ...	289
Kishan Chand v. Sohan Lal, 2 Lahore, 95: 59 Ind. Cas. 710 ...	132

	PAGE.
Kishna Lal v. Ganga Ram, 13 All. 28 ...	16
Kitson v. Hardwich, 1872 L. R. 7 Ch. Prac. 473 ...	59
Kiyaparaju v. Veeva Venkata, 44 M. L. J. 303: 1923 M. W. N. 195: 72 Ind. Cas. 488 ...	62
Kochappa v. Sachi Devi, 26 Mad. 494 ...	249
Kochu Mahomed Tharagon v. Sankaralinga Mudali- lier, 40 M. L. J. 219: 1921 M. W. N. 236: 14 L. W. 508: 62 Ind. Cas. 495 ...	28, 225, 245, 247
Kalka Das v. Gajju Sing. 43 All. 510 ...	5, 117, 127, 264
Komara Sami v. Govind, 11 Mad. 136 ...	87
Konda Pillai v. Diduvant Ramchandra, 13 L. W. 616: 1921 M. W. N. 535: 62 Ind. Cas. 854 ...	130
Koppartha v. Aravati, 41 Mad. 169 ...	302, 307
Koppuravvari v. The Guntur Cotton Mills, Ltd. 14 M. L. T. 587: M. W. N. (1914) 153 ...	77
Kothandarama v. Murugesam, 13 M. L. J. 372: 27 Mad. 7 ...	173
Kripa Ram v. Mangal Sen 19 A. L. J. 696: 65 I. C. 93: 3 U. P. R. All. 18: 1922 A. I. R. All. 337 ...	73
Krishna Iyer v. Official Receiver, Trichinapoly, (1925) A. I. R. (M.) 381 ...	32, 35, 216
Krishnan Naiyar v. Itinnan Naiyar, 24 Mad. 637 ...	93
Kristo Komul v. Sures Chandra, 8 Cal. 556: 12 C. L. R. 253 ...	130, 138
Kumaraswami Nadar v. Venkataswami, 46 M. L. J. 242: 78 Ind. Cas. 857: 1924 A. I. R. (M.) 830 ...	311
Kumud Nath Raichaudhuri v. Jatindranath Chau- dhuri, 38 Cal. 394: 13 C. L. J. 221 ...	72, 73
Kundan Lal v. Khem Chand, 44 All. 620 ...	277
Kundan Lal v. Sadi Ram. 55 P. R. 1917: 132 P. W. R. 1917 ...	245
Kunj Beharee v. Madhu Sodar, 50 Ind. Cas. 117 ...	222
Kuppu Ramanatha v. Nagindra, 18 L. W. 868: 45 M. L. J. 827: 1824 A. I. R. (Mad.) 223: 76 Ind. Cas. 805 ...	1
Kuppusami v. Marimuthu, 82 Ind. Cas. 438: 47 M. L. J. 487: 1924 M. W. N. 807 ...	121
Kuppuswami v. Zamindar, 27 Mad. 341 ...	303
Kutner. In Re. 1921, 3 K. B. 93 ...	18, 184

L

Lechman Das v. Jai Sing, 79 I. C. 458 ...	86
Ladu Ram v. Mahabir Pershad, 39 All. 171: 37 Ind. Cas. 996 ...	286
Lahbu Ram v. Puran Chand, 130 P. R. 1919 ...	229
Lahkmiram v. Punamchand, 22 Bom. L. R. 1173: 45 Bom. 550 ...	182, 192

TABLE OF CASES.

xli

PAGE.

Lakhpriya v. Rai Kissori, 20 C. W. N. 554	...	217
Lakhiram v. Punamchand, 22 Bom. L. R. 1173	...	304
Lakshmanan v. Muttia, 11 Mad. 1	...	161
Lakshminarain Aiyar v. C. R. Subramania Aiyar, 45 M. L. J. 129: 1923 M. W. N. 328: 73 Ind.	...	73, 104, 109
Cas. 74: 1923 A. I. R. 585 (Mad)	...	127
Lala Govindram v. Kunj Behari, 83 Ind. Cas. 803	...	45
Lala Hakim Lal v. Mooshahar Sahoo, 11 C. W. N. 889: 6 C. L. J. 410: 34 Cal. 99	...	13, 94, 123
Lal Bahadur v. Paspas Prosad, 74 Ind. Cas. 301: 1923 A. I. R. 154 (Oudh)	...	169, 214, 220,
Lalji Sahay v. Abdul Gani, 15 C. W. N. 253: 12 C. L. J. 452	...	221, 296
Lamb v. Wright & Co., (1924) 1 K. B. 857	...	137
Lancaster Banking Corporation, <i>Ex parte</i> , In Re., Westley, 10 Ch. D. 776	...	159, 308
Lancaster, <i>Ex parte</i> , 22 Ch. D. 695	...	231
Lancaster, <i>Ex parte</i> , Re. Marsden, 1883, 2 Ch. D. 311	...	232
Laurie, 5 Manson 48: 16 L. J. Q. B. 431	...	232
Laurie, Re. <i>Ex parte</i> Green, 6 Mans. 48	...	232
Laxmi Bank Id., In the v. Ram Chandra Narayan Apte, 42 Bom. 757: 24 Bom. L. R. 292	...	66, 97, 103, 108
Lehmann, <i>Ex parte</i> Haslack, 1890, 7 Morr. 181	...	60
Linton v. Linton, 1885, 15 Q. B. D. 239	...	98, 150, 160
Linton, Re. 1892, 8 T. L. R. 219	...	84
Lloyd, <i>Ex parte</i> , Re. Peters (1882) 46 L. T. 64	...	253
Louis Dreyfus v. Jan Mahomed, 49 Ind. Cas. 421	...	131
Louis v. Esdale, 1891, A. C. 210	...	301
Lovell and Christmas v. Beauchamp, 1894 A. C. 607	...	56
Lowenthal, Re. 13 Q. B. D. 233	...	30
Lucas, J. M. v. Official Assignee, Bengal, 24 C. W. N. 418	...	218, 283, 284,
Luchminarain Dube v. Kripan Lall, 10 A. L. J. 703: 47 Ind. Cas. 733	...	285, 288
Lyon Lord & Co. v. Virbhandas, 76 Ind. Cas. 380: 1924 A. I. R. (S) 69	...	113
	...	213
	...	242, 243

M

Macleod v. B. B. & C. I. Ry. Co., 7 Bom. L. R. 618	...	139
Macleod v. Kikabhoy, 25 Bom. 659	...	134
Maddever, Re. 1884, 27 Ch. D. 523	...	217
Maddipati v. Gandrappu, 24 M. L. J. 106: 1918 M. W. N. 476: 47 Ind. Cas. 308	...	245
Madharao v. Nago, 1923 A. I. R. (Nag.) 80	...	21
Madho Pershad v. Walton, 18 C. W. N. 1050	...	38, 70, 72, 74

	PAGE.
Madho Ram v. The Official Assignee, 27 C. W. N. 611	228, 233, 235
Madhu Sardar v. Kshitish Chandra Banerjee, 42 Cal. 289	91, 210, 243
Madhu Sudhan v. Parbati Sundari, 35 Ind. Cas. 643	211, 300
Maguda Pillay Rawther v. Muhammadhu Rowther, 9 Mad. L. W. 535	225 182
Mahadeb v. Kuppuswami, 15 Mad. 233	250
Mahamed Shah, <i>In Re.</i> 13 Cal. 66	202, 267
Maharajah of Burdwan v. Apurva Krishna Roy, 15 C. W. N. 172	209
Maharana Kunwar v. E. V. David, 77 I. C. 57: (1924) A. I. R. (All.) 40: 21 A. L. J 737	29, 259, 261, 275, 277, 279
Mahomed Shuffi v. Laldin, 3 Bom. 227	71
Main Goman Singh v. Gonesh Lal, 35 P. R. 1888	78
Makhan Lal Chatterjee, <i>In the goods of</i> , 15 C. W. N. 350	58
Makhan Lal v. Sreelal, 34 All. 382: 9 A. L. J. 371: 14 Ind. Cas. 162	21, 298
Malchand v. Gopal Chandra Ghoshal, 21 C. W. N. 298	81, 110, 152, 164 165, 166, 167
Maluk Chand v. Mani Lal, 28 Bom. 364	173
Manak Chand v. Ibrahim, 17 N. L. R. 49: 62 Ind. Cas. 307	254
Manaparama Padyachy v. Armugum Padyachy, 1 L. B. R. 229	105
Manchester and Liverpool District Banking Co., <i>Ld.</i> , <i>Ex parte</i> (1924) 2 Ch. D. 199	200
Manekji, <i>Re.</i> 10 Bom. L. R. 84	304
Manekshah v. Dadabhai, 27 Bom. 604	298, 299
Manickchand Virchand, <i>In Re.</i> 47 Bom. 275	24, 305
Manicklal v. Saratkumari, 22 Cal. 648	250
Manindra Chandra, Maharajah, v. Chandi Charan, 24 C. W. N. 582	272
Maniram Sett v. Sett Rupchand, 33 Cal. 104: 10 C. W. N. 874	307
Manji v. Giridari Lal, 2 Lah. 78: 61 Ind. Cas. 674	264 44
Manmohan Das v. N. C. Macleod, 26 Bom. 765	167, 170
Mannu Lal v. Nelin Kumar Mukherji, 16 A. L. J. 938: 48 Ind. Cas. 433	30
Mapleblack, <i>In Re. Ex parte</i> , Butt, 4 Ch. D. 150	43
Marcet v. Peterson, 1868, L. R. 4 Exch. 104	119, 134
Marshall, <i>Re.</i> 7 Cal. 421	249
Martin v. Lawrence, 4 Cal. 655	
Mathura Ram v. Baldeo Ram, 80 Ind. Cas. 21: 1924 A. I. R. (All.) 800	66, 109

	PAGE.
Matiram v. Vithal, 13 Bom. 90 F. B. ...	16
Maugham, <i>Exparte</i> , 21 Q. B. 21 ...	85
Maund, <i>Exparte</i> , 16 Eq. 615 ...	192
Maund, <i>Re Exparte</i> Maund, 1895. 1 Q. B. 194 ...	77
Maung Kyi Oh v. Arun Chellam Chetti, I. L. R. 2 Rangoon 309: 84 I. C. 968 ...	51, 56
Maung Po Mya v. Maung Po Kiya, 30 Ind. Cas. 943 ...	110
Mead, <i>In Re</i> . L. R. 20 Eq. 282 ...	248
Meghraj Nevendram, Firm of, v. Firm of Virbhanda- das, 76 Ind. Cas. 250: 1924 A. I. R. (Sind) 122 ...	162
Mercantile Bank v. Official Assignee, Madras, 39 Mad. 250: 39 Ind. Cas. 942 ...	47, 136
Meyer, <i>Exparte</i> , <i>Re</i> . Stepheney, 1871, 7 Ch. App. 188 ...	46
Mi Bu v. Ngapo Soung, U. B. R. (1911) 84: 11 Ind. Cas. 743 ...	107
Miller, A. B. v. Abinas Chandra, 2 C. W. N. 372 ...	130
Miller v. Beer. 6 C. L. R. 294 ...	195
Miller v. National Bank of India, 19 Cal. 146 ...	193
Miller, <i>Re</i> . 1901, 1 K. B. 51 ...	60
Minatunnessa v. Khatunnessa, 21 Cal. 479 ...	258
Mir Ansar Ali v. Guru Charan, 16 All. 37 ...	93
Mirappa v. Raman Chettier, 42 Mad. 322: 10 M. L. W. 59: 52 Ind. Cas. 519 ...	214, 217, 226
Mir Sha v. Rahim Bux, 1923 A. I. R. 33 (All.) ...	228
Mirza Ali v. Quadiri Khanam, 21 P. L. R. 1919: 50 Ind. Cas. 774 ...	160
Misri Lal v. Kanhya Lal, 66 Ind. Cas. 863 ...	30
Mohammad Muniruddin Khan v. Mahmud Buksh, 63 Ind. Cas. 91 ...	142, 144
Mohandas v. Tikamdas, 10 S. L. R. 123 ...	228
Mohd. Safiq-ul-Huq. v. Krishna Gobind, 23 C. W. N. 284: 48 I. C. 428: 28 C. L. J. 77 ...	19
Mohiruddin Sarkar v. The Secretary, Hadal Gramya Rindan Samiti, 57 Ind. Cas. 977 ...	52, 67
Moir, <i>In Re</i> ., 1884, 25 Ch. D. 605 ...	71
Mokshagunam v. Ramakrishna, 42 M. L. J. 426 ...	120, 144, 145, 197 199, 260
Momet, <i>In Re</i> ., 21 Cal. 634 ...	72, 185
Monmohan v. Hemanta, 23 C. L. J. 553 ...	283
Mool Chand v. Sarjoog Pershad, 12 C. W. N. 273: 7 C. L. J. 268 ...	87, 299
Moon, <i>Exparte</i> , 1887, 19 Q. B. D. 669 ...	177
Moore, <i>Exparte</i> , 14 Q. B. D. 627 ...	5
Moosaji Lotia, <i>In Re</i> ., 15 Ind. Cas. 825: 5 S. L. R. 249 ...	157
Morgan, <i>Re. Exparte</i> , Turner, 1915 2 Mans, 508 ...	47

	PAGE.
Moses Kerokoose v. Benjamin Brookes, 8 M. I. A.	
339: 4 W. R. 61: 1 Suth P. C. J. 426 ...	272
Moss, <i>Ex parte</i> , Re. Toward, 1884, 14 Q. B. D.	
310	138
Moti Lal v. Ganpat Ram, 21 C. W. N. 936: 23	
C. L. J. 220	166, 174
Motilal v. Utamjagjivandas, 13 Bom. 434 ...	219
Motiram Doulatram v. Pahlaj Rai Gopaldas, 80	
Ind. Cas. 141: (1925) A. I. R. (S) 159 ...	8, 128, 171
Motiram v. Rodwell, 21 A. L. J. 32: (1923) A. I. R.	26, 134, 142, 146,
(A) 159	197
Moula Baksh v. Tezmal, 20 Ind. Cas. 395: 11	
A. L. J. 545	45
Muchiram v. Ishan Chunder, 21 Cal. 568 F. B. ...	120
Muhammad Fatima v. Muhammad Mashuq Ali,	
44 All. 617: 20 A. L. J. 569	140
Muhammad Habibulla v. Mustaq Hossain, 39 All.	
95	210
Muhammad Hussain v. Elahi Baksh, 10 A. L. J.	
188: 17 Ind. Cas. 92	109
Muhammad v. Muhammad, 13 C. L. R. 330 ...	16
Muhammad Sariff v. Radhamohan, 57 Ind. Cas.	
760	210
Muhammad Shir v. Mahabir Prasad, 15 A. L. J.	
572: 40 Ind. Cas. 445	80
Muhammad Zahiruddin v. Md. Nuruddin, 21 Cal.	
85	248
Muhammad v. Munsiram, 54 P. R. 1917: 132	
P. W. R. 1917	248, 258
Mulchand v. Murarilal, 36 All. 8	21, 261, 278
Mulraju, Raja v. Official Assignee, Madras, 28	
M. L. J. 403: 29 Ind. Cas. 37	9
Mumtaz Hussain v. Brijmohan Thakur, 4 Cal. 888	
Muni Lal v. Bhagwan Das, 26 Ind. Cas. 24 ...	77
Muni Lal v. Sasibhusan Ray, 2 Pat. L. T. 166:	
60 Ind. Cas. 848	109
Municipal Board, Barielly v. Hafiz Alabaksh, 22	
A. L. J. 457	71
Munna Lal v. Kunj Bihari Lal, 44 All. 605: 20	
A. L. J. 517	300
Munna Singh v. Dig Bijai Singh, 19 A. L. J.	
273	67
Murad Ally v. Lang, 21 P. L. R. 980 ...	191
Murari Lal v. E. V. David, 84 Ind. Cas. 739:	
22 A. L. J. 1116	119, 244, 261
Murray, <i>In Re.</i> , an Insolvent, 3 Cal. 59 ...	119
Murugesa v. Chinanthabai, 24 Mad. 421 ...	263
Mushahor Sahu v. Hakim Lal, 43 Cal. 521 P. C. ...	234

	PAGE.
Musummut Halima v. Muthura Das, 10 S. L. R. 179: 40 Ind. Cas. 122	276
Muthia Chettiar v. Luxmi Narasa Aiyar, 13 L. W. 141: 61 Ind. Cas. 756	58
Muthuswami Swamiar v. Samoo Kandiar, 43 Mad. 869: 39 M. L. J. 438	128, 242, 252, 311
Mutton, <i>Re</i> , 1887, 19 Q. B. D. 102	185

N

Nabadwip Chandra Shah, <i>In Re</i> , an Insolvent, 13 Cal. 68	120
Nabin v. Mritunjoy, 40 Cal. 50: 17 C. W. N. 1241	93
Nachlappa Chetty v. Thungarahi Chetty, 34 Ind. Cas. 696	88
Nagindas Bhukhandas v. Ghelabhai Gulabdas, 56 Ind. Cas. 449	38, 94, 126, 283, 286
Nagindas Chunilal v. Official Assignee, Bombay, 35 Bom. 473	30
Naidar v. Ramji Lal, 23 A. L. J. 503	296
Nalam Viswanatham v. Official Assignee, 32 Ind. Cas. 795	5
Nanallagati Goundan v. Ramana Goundan. 47 M. L. J. 783: 1925 A. I. R. (Mad) 170	37, 99
Nand Kishore v. Suraj Mal, 37 All. 426	283
Nand Lal v. Nathmal Srinivas, I. L. R. 3 Patna 443: 83 Ind. Cas. 877: (1924) A. I. R. (Patna) 559	99
Nanhi Mal v. Emperor, through Raghubir Pershad, 17, O. C. 138: 25 Ind. Cas. 363	285
Naoroji v. Chartered Bank of India, 1868, L. R. 3 Ch. Prac. 444	195
Naorji v. Kazi Siddiq Mirza, 20 Bom. 636	139
Naoroji Sarabji, <i>In Re</i> , 33 Bom. 462	96, 117, 283
Naoroji Talati, <i>In Re</i> , 33 Bom. 462	304
Narain Das v. Bankim Chandra, 85 I. C. 396	14
Narasingha v. Virasghavahi, 41 Mad. 440	26
Narayan Ganesh v. Sagunabai Gangadhar, 26 Bom. L. R. 1200	124
Nathmull v. Ganeshmull Jivanmull, 34 C. L. J. 349	88
Nathumal v. District Judge of Benares, 32 All. 547: 7 A. L. J. 732: 6 Ind. Cas. 870	51, 282
Navivahoo v. Narottamdas, 7 Bom. 5	249
Nawab v. Topan Ram, 62 P. W. R. 1916: 35 Ind. Cas. 94	283
Nasir Hossan v. Matin-us-Zaman (1925) A. I. R. (O) 299	10, 263

Newprance and Garard's Trustee v. Hunting (1897) 2 Q. B. 19	231
New South Wales Taxation Commissioner v. Palmer, 1907 A. C. 179	190
Nga Chock v. M. Pwa, 1914 U. B. R. 1: 24 Ind. Cas. 767	283
Nickoll, <i>Ex parte</i> , 13 Q. B. D. 469	47
Nidhon Mullick v. Ramani Mohan, 63 Ind. Cas. 848	298
Nikka Mal v. Marwar Bank Ltd., 52 Ind. Cas. 188	236
Nilmoni Chaudhuri v. Basanta Kumar, 19 C. W. N. 865	223
Nilmoni Chaudhuri v. Durga Charan Chaudhuri, 22 C. W. N. 704	27, 245, 256
Niothan Mullick v. Ramani Mohon, 63 Ind. Cas. 846	23
Norris, <i>Re. Ex parte</i> , Reynolds, 1883, 5 Moor. 115	72
Nripendranath Sahu v. Asutosh Ghose, 19 C. W. N. 157	45, 228
Nurasimulu v. Basava Sankaram (1925) A. I. R. (M.) 249	14, 115, 128, 243
Nuthally, <i>Re.</i> , 1891 W. N. 55	149

O

Official Assignee v. Bidya Soonderi, 30 C. L. J 428	217
Official Assignee, Bombay v. Brijkishore, 3 A. L. J. 614: A. W. N. (1914) 250	45
Official Assignee, Bombay v. Firm of Chandulal Chimanlal, 76 Ind. Cas. 657	7, 8
Official Assignee, Bombay, v. Registrar, S. C. Court, Amritsar, 37 Cal. 418 P. C. 11 C. L. J. 443: 14 C. W. N. 569: 7 A. L. J. 357: 12 Bom. L. R. 395	169
Official Assignee's Commission, <i>In Re.</i> , 36 Cal. 990	250 252
Official Assignee, Madras v. D. Rajan Aiyar, 33 Mad. 299	157
Official Assignee, Madras v. G. Smith, 32 Mad. 68	157
Official Assignee, Madras v. Mehta & Sons (1919) M. W. N. 293	232
Official Assignee, Madras v. Ramchandra Aiyar, 46 Mad. 55: 43 M. L. J. 569	123
Official Assignee, Madras v. Sambanda Mudaliar, 43 Mad. 739: 39 M. L. J. 345	223
Official Assignee v. Ramachandra, 33 Mad. 134 ...	278, 297
Official Assignee v. Ramalinga, 8 Mad. 79 ...	250

TABLE OF CASES.

XLvii

PAGE.

Official Receiver of Coimbatore v. D. D. Kanga, 14 L. W. 655: 1921 M. W. N. 858 ...	118, 132, 258
Official Receiver, South Arcot v. Perumal Pillai, 79 I. C. 322: 1924 A. I. R. (Mad.) 387 ...	29, 30, 247
Official Receiver, Tanjore v. Nataraja Sastrigal, 46 Mad. 405: 72 Ind. Cas. 225: 1923 A. I. R. (Mad.) 355 ...	35, 253, 297
Official Receiver, Tanjore v. Venkatarama Iyer, 42 M. L. J. 362: 1922 M. W. N. 51 ...	209
Official Receiver, Tanjore v. Vidappa Mudaliar, 47 M. L. J. 431: 1924 M. W. N. 506: 1924 A. I. R. (M.) 865 ...	216, 224
Official Receiver, Tinnevely v. Sanagaralinga Mudaliar, 44 Mad. 524 ...	247
Official Receiver, Trichinopoly v. Somasundaram Chettiar, 34 Ind. Cas. 602: 30 M. L. J. 415 ...	220, 245, 311
Omar Bahadur v. Khaja Muhammad, 79 Ind. Cas. 56: 1924 A. I. R. Pat. 667 ...	140
Omerto Lal Das, <i>In Re.</i> 13 B. L. R. App. 2 ...	157
Onkarsa v. Bridichand, 73 Ind. Cas. 1037: 1923 A. I. R. 290 (Nagpur) ...	6, 120, 238, 240
Oriental Bank v. Richer, 9 A. C. 413 ...	112
Origanti v. Desikachari, 36 M. L. J. 461 ...	96
Otway, <i>Re Exparte</i> , Otway, ...	107
Owen v. Ruth, 1854, 23 L. J. C. P. 105 ...	60

P

Paine, <i>In Re.</i> 1897, 1 Q. B. 122 ...	157
Painter, <i>Exparte</i> , <i>Re</i> , Painter 1895 1 Q.B. 851 ...	164
Painter, <i>In Re</i> , (1895) 1 Q. B. 91 ...	110, 165
Palaniappa Chetty v. Subramaniam, 1920 M. W. N. 135: 38 M. L. J. 388: 54 Ind. Cas. 740 ...	283, 286, 297
Palaniappa v. Official Receiver, Trichinopoly, 25 Ind. Cas. 948: 4 L. W. 51: M. L. T. 334: 32 M. L. J. 84 ...	218, 245
Paltu v. Janki Prasad, 6 B. L. R. 119 ...	86
Pamanmal v. Hemanmal, 35 Ind. Cas. 451 ...	191
Panangunalli v. Ramchandra, 38 Mad. F. B. 152: 15 M. L. J. 1 ...	190
Panja Ram v. Gurraju, 18 L. J. 282: 76 Ind. Cas. 877: 1924 A. I. R. (Mad.) 147 ...	276
Parbati v. Raja Shyamrikh, 20 A. L. J. 147: 44 All. 296 ...	5, 60, 66, 127, 264
Parkinson & Ors. v. Noel (1923) 1 K. B. D. 117 ...	9, 120, 121
Parmanmall Hemanmal, <i>In application by</i> , 35 Ind. Cas. 541 ...	98
Parmers, H. W. v. Cowasji, 14 A. L. J. 236: 38 Ind. Cas. 723 ...	210

	PAGE.
Parvatheesam v. Bapanna, 13 Mad. 447 ...	10, 13
Paul Ram v. Sheonath Pershad, 2 P. L. J. 235 ...	210
Peacock v. Baijnath, 18 I. A. 78: 18 Cal. 573 ...	18
Pelayudham Pillai v. Official Receiver, Tinnevely, 26 M. L. T. 139: 1919 M. W. N. 622: 52 Ind. Cas. 689 ...	167
Petta Ramaswamiar v. Subramania Iyer, 79 Ind. Cas. 443: 1925 A. I. R. (Lah.) 331 ...	227
Philliphs, <i>Re</i> , <i>Ex parte</i> Barton, 1900, 2 Q. B. 329	43
Pinfold, <i>Re</i> , <i>Ex parte</i> Pinfold, 1892, 1 Q. B. 73 ...	51
Pirthi Nath v. Basheshwar Nath, 69 Ind. Cas. 403 ...	222, 237
Pitaram v. Jujhar Sing, 39 All. 626 ...	275, 276, 277
Pitchford, <i>In Re</i> , (1924) 2 Ch. D. 260 ...	160
Ponlette v. Hood, 35 Beav. 274: Fisher 215 ...	16
Ponnu Swami Chetty v. Narayanswami Chetti, 14 M. L. T. 304: 25 M. L. J. 445: 21 Ind. Cas. 293 ...	47, 77, 110, 165
Ponsford v. Watson, 1868 L. R. 3 C. P. 167 ...	42
Poona Lal v. Kanhya Lal, 19 Cal. 730 ...	179, 180
Prakas v. E. E. Adlam, 30 Cal. 696 ...	250
Pramatha v. Khetra, 32 Cal. 270 ...	259, 279
Pramatha Nath v. Mohini Mohan, 19 C. W. N. 1200 ...	210
Preo Nath v. Nibaran, 15 C. L. J. 631 ...	107, 109
Prior, <i>In Re</i> , 1921, 3 K. B. 333 ...	274
Promotho Nath Pal Choudhury v. Saurav Dasi Choudhurani, 24 C. W. N. 1011 ...	2
Pulpati Hanumaya v. Ravuri Ramayya, 41 M. L. J. 126: 1921 M. W. N. 381: 64 Ind. Cas. 270 ...	3
Punithavela v. Bhashyam, 25 Mad. 406 ...	16, 19, 134, 136 145
Puram Chand v. Puram Chand, 1923 A. I. R. 652 (Lahore) ...	229, 233
Puran v. Atwargir, 13 A. L. J. 434: 29 Ind. Cas. 217 ...	43
Puran Chand v. Punjab National Bank Ltd., 3 U. P. L. R. 6: 59 Ind. Cas. 578 ...	230, 233
Purshotam Das v. E. B. David, 13 A. L. J. 893: 30 Ind. Cas. 779 ...	199, 210
Purshatam Naidu v. Ponnurangam, 1913 M. W. N. 897: 15 M. L. T. 92: 21 Ind. Cas. 576 ...	122
Purushottam Naidu v. Ramaswamy, 1925 A. I. R. (Mad.) 245 ...	144
Pyari Chand, <i>In Re</i> , 6 B. L. R. 558 ...	88

TABLE OF CASES.

XLIX

PAGE.

Q

Quasim Ali v. Emperor, 43 All. 407: 19 A. L. J.	
378: 64 Ind. Cas. 37	281
Queen v. Gopal, 3 Mad. 971	105
Quiley, <i>Ex parte</i> , <i>Re</i> , Adams, 1878, 9 Ch. D. 307	59

R

Raati, <i>Re</i> , <i>Ex parte</i> Raati, 1897, 2 Q. B. 80	53
Radha Krishnaiah Chetty, 84 I. C. 128	56
Radha Mohan v. Ghasiram, 40 Ind. Cas. 96: 38 P. W. R. 1917	297
Radha Mohan v. M. C. Whyte, 45 All. 364: 21 A. L. J. 216: 73 Ind. Cas. 413: 1923 A. I. R. 466 (All.)	272
Radhey Shiam v. Hakim Saiyed Md. Taque, 72 Ind. Cas. 911: 1923 A. I. R. 36 (o)	113
Raghubir Singh v. Ram Chunder, 8 A. L. G. 1287...	127
Raghunath Das v. Sundar Das Khetri, 42 Cal. 72 P. C. 20 C. L. J. 555: 16 Bom. L. R. 814: 24 Ind. Cas. 304	239
Rain v. Bank of Bengal, 5 C. W. N. 16	144
Raja Brij Narain v. Mangla Prasad, 46 M. L. J., 23 P. C.: 28 C. W. N. 253: 21 A. L. J. 934	124
Raja Debi Baksh Sing v. Habib Shah, 17 C. W. N. 892	82
Raja Mulraju v. Official Assignee, Madras, 2 M. L. W. 312: 17 M. L. T. 247: 1915 M. W. N. 262: 28 M. L. J. 403: 29 Ind. Cas. 37	126
Rakhal Chandra Purkait v. Sudhindra Nath Bose, 46 Cal. 991: 24 C. W. N. 172	146, 204, 224
Raman Chetty v. A. V. P. Firm. 31 Ind. Cas. 884	275, 277
Ramanatha Aiyar v. Nagindra Aiyar, 1924 A. I. R. (Mad.) 223	10
Ramanatham v. Subramaniya, 26 Mad. 179	208
Ramasami v. Murugesu, 20 Mad. 452	170
Ramaswami Chettiar v. Ramaswami Aiyangar. 42 M. L. J. 185: 1922 M. W. N. 110	25, 32, 35, 246
Ramaswami Pillai v. Gobindaswami Naiker, 42 Mad. 319: 25 M. L. T. 247: 49 Ind. Cas. 626	131, 149, 307
Rambadia Chetty v. Ramaswami Chetty. 44 M. L. J. 284: 73 Ind. Cas. 375	253, 257, 275
Ram Bahudra v. T. V. Nipunjii (1924) A. I. R. (B) 49	240
Ram Behari Lal v. Gaganath, 19 O. C. 89	285

L PROVINCIAL INSOLVENCY ACT, 1920.

	PAGE.
Ram Chander Sarup v. Mahajan Hussain, 1 U. P. L. R. 67: 51 Ind. Cas. 55 ...	161
Ram Chandra Narayan v. P. V. Nipunge, 25 Bom. L. R. 499: 73 Ind. Cas. 317: 1924 A. I. R. (Bom.) 49 ...	274
Ram Chandra v. Rakhal. 17 C. W. N. 1045 ...	246
Ram Chandra v. Shama Charan, 18 C. W. N. 1052 19 C. L. J. 83 ...	8, 120, 163
Ramjas v. Katha Singh, 9 P. L. R. 192: 14 P. W. R. 1921: 59 Ind. Cas. 51 ...	35
Ram Kissen v. Umaro Bibi, 18 P. W. R. 1916: 33 Ind. Cas. 730 ...	298, 302, 307
Ram Komol Saha v. Bank of Akyab, 5 C. W. N. 91 ...	150, 250
Ram Krishna Misra, <i>Exparte</i> . I. L. R. 4 Pat. 51: (1925) A. I. R. (P) 355 ...	37, 188
Rampal Sing v. Nandolal Marwari, 16 C. W. N. 346 ...	307
Ramprasad Bhagat v. Mahadev Lall, 2 P. L. T. 335: 61 Ind. Cas. 870 ...	54
Ramprasad v. Seth Jaskaran, 82 Ind. Cas. 488: 1925 A. I. R. (Nag.) 73 ...	226
Ramrakha Mal v. Nazar Mal 52 P. R. 1918: 47 Ind. Cas. 435 ...	113
Ramsaran Mandar v. Siva Prasad, 58 Ind. Cas. 783 ...	91, 221, 243
Ramsay. (1913) 2 K. B. 80 ...	232
Ramsay v. Calvert, 15 C. W. N. 290n ...	211
Ramsebak Misser, <i>In the matter of</i> , 6 B. L. R. 310 ...	112
Ramsundar Rai v. Ram Dhyan Ram, 3 P. L. J. 456: P. W. N. Pat. (1918) 303: 5 P. L. W. 215: 46 Ind. Cas. 224 ...	131, 149
Ram Sundar Ram v. Ram Charit Bhakat, 79 Ind. Cas. 726 ...	31, 222
Ram Swarup v. Gagat Ram, 2 Lah. 102: 59 Ind. Cas. 977 ...	223
Rangiah Chettiar v. Annasami Alwar Ayyangar, 1923 M. W. N. 840: 79 Ind. Cas. 408: 1924 A. I. R. (Mad.) 368 ...	3
Rangya Chetti v. Tanikchella Mudaly, 19 Mad. 74 ...	122
Rash Behari v. Bhagwan Chandra, 17 Cal. 209 ...	282
Ras Jas v. Katha Sing, 59 Ind. Cas. 51: 9 P. L. R. 192: 14 P. W. R. 1921 ...	86
Rasul Huzi Cassum, <i>In Re</i> . 18 Bom. L. R. 13 ...	274
Rawlandson v. Champion, 17 Mad. 21 ...	130, 139
Reg v. Dyson, (1894) 2 Q. B. 176 ...	289

TABLE OF CASES.

Li

	PAGE.
<i>Reg v. Ellis</i> , (1898) 19 Cox. C. C. 210 ...	290
<i>Rex v. Wells</i> , 1812, 16 East. 278 ...	266
<i>Richardson v. Gooding</i> , 2 Vern, 293 ...	11
<i>Robins & Co. v. Gray</i> (1895) 2 Q. B. 78 ...	19
<i>Rodrigues v. Ramaswami</i> , 40 Mad. 783 ...	6, 236
<i>Roebern, M. A., v. Tollikoffer</i> , 2 Rang 193 ...	231
<i>Rogers v. Spencer</i> , 67 R. R. 736 ...	7
<i>Rogers, Re. Ex parte</i> Holland. 1891, 8 Morr. 243 ...	239
<i>Rolla Ram v. Ram Labhya Mal</i> , 80 Ind. Cas. 509: 6 L. L. J. 232 ...	207, 213
<i>Rose v. Hart</i> , 2 Smith's Leading Cases, 9th Ed. 324 ...	195
<i>Ross, Ex parte</i> , 2 Gl. & Jameson's Bankruptcy Cases, 46 & 330 ...	159, 308
<i>Ross v. Hayock</i> , 1834, 1 A. D. & E. L. 460 ...	43
<i>Rowe & Co. v. Tanthean Taik</i> , I. L. R. 2 Rang. 643: 84 Ind. Cas. 909 ...	133, 187
<i>Rukmani v. Rajagopal</i> , 47 M. L. J. 495: 1924 M. W. N. 813: 84 I. C. 281 ...	59
S	
<i>Sabhapathi, Re</i> , 21 Bom. 297 S. ...	81, 165
<i>Sackman, Re, Ex parte</i> Foley, 1890, 21 Q. B. D. 728 ...	43
<i>Sadarmal v. Aranvyal</i> , 21 Bom. 205 ...	267
<i>Sādarmal v. Aranvyal</i> , 21 Bom. 205 ...	121
<i>Sadasiva Mudaliar v. Hajee Mahomed Sait</i> , 27 C. W. N. 677 (P. C.): 37 C. L. J. 569: 72 I. C. 48: 44 M. L. J. 396 ...	56
<i>Sadodin v. W. Spiers</i> , 3 Bom. 437 ...	256
<i>Safiq-Uzzaman v. Deputy Commissioner, Oudh</i> , 18 O. C. 125: 30 Ind. Cas. 674 ...	173 174
<i>Sagar Mal v. Rao Girraj Singh</i> , 39 All. 120: 14 A. L. J. 1031: 38 Ind. Cas. 171 ...	79, 127
<i>Sahay Narain v. Wajed Hossain</i> ...	124
<i>Sahu Ramchandra's Case</i> , I. L. R. 39 All. 437 (P. C.) ...	124
<i>Saliq Sing v. Ram Kishan</i> , 10 A. L. J. 51 ...	80
<i>Samiruddin v. Kadumoyee</i> , 15 C. W. N. 244: 12 C. L. J. 445 ...	36, 52, 68, 110,
<i>Sanchi Khan v. Karam Chand</i> , 73 Ind. Cas. 705 ...	165, 178, 284
<i>Sankaranaiyana Pillai v. Rajamani</i> , 47 Mad. 462: 46 M. L. J. 314 ...	277 124
<i>Sankara Rao v. Turlapati Rama Krishnaiah</i> , 1924 (M) 461: 46 M. L. J. 184 ...	252, 280
<i>Sankar Narayana v. Alagirj</i> , 49 Ind. Cas. 283: 1918 M. W. N. 457: 24 M. L. T. 149: 35 M. L. J. 296 ...	147, 224

	PAGE.
Sannyasi Charan Mondole v. Asutosh Ghosh, 42 Cal. 225	56, 120, 164, 245
Sannyasi Charan Mondole v. Krishna Dhan Bannerjee, 49 C. 560 (P. C.): 87 I. C. 124 ...	56, 125
Sant Singh v. Shew Dut Singh, I. L. R. 2 Pat 724	14, 119, 124, 143, 146, 197, 256, 258
Sarabji v. Gobindramji, 16 Bom. 91 ...	208
Sargeant, <i>In Re</i> (123) 2 Ch. D. 302 ...	138
Sarodaprasad v. Ramsukh, 2 C. L. J. 318 ...	50, 56
Sasson, E. D. & Co. v. Museji Ismailji Lotia, 9 Ind. Cas. 485	249
Sathirasagam Pillai v. Meenakshisundaram Iyer, 14 L. W. 361	125
Satis Chandra Addy v. Firm of Rajnarain Pakhira and Rasiklal Pakhira, 72 Ind. Cas. 60 ...	51, 56, 58, 65, 74, 103, 109
Sat Narain v. Behari Lal, 51 I. A. 22: I. L. R. 6 (Lahore) 1: 47 M. L. J. 857: 1925 A. I. R. 18 P. C.	12, 13, 14, 124
Satrasala Hanumantha v. Talisetti Subbayyar, 1921 M. W. N. 109: 61 Ind. Cas. 767 ...	206
Satyabadi v. Musst. Harabati, 34 Cal. 223: 5 C. L. J. 192	19
Satya Kinkar Mukherji. v. Manager, Benares Bank, Ltd., 22 C. W. N. 700	26
Savin <i>Re</i> . L. R. 7 Ch. App. 760	203
Scott v. Surman, 1743 Wiles 400	9
Searle v. Choat, 25 Ch. D. 773	274
Searle, Hoare & Co., <i>In Re</i> , (1924) 2 Ch. D. 325 ...	268
Secretary of State v. Dahi Reddi Nagiah, 25 M. L. T. 12: 36 M. L. J. 180: 50 Ind. Cas. 593 ...	43
Secretary of State v. Judah, 12 Cal. 652 ...	100
Secretary of State v. Rajkumar Mukherji, 50 Cal. 347	78, 94, 126
Sellarnuthu Servai. <i>In Re</i> , 47 Mad. 87 (F. B.) 1924 M. W. N. 94	124
Seth Ghanshamdas v. Uma Prasad, 23 C. W. N. 817 P. C.	229, 234
Seth Maniklal v. Raja Bejoy Singh, 1921 M. W. N. 80 P. C.	223
Seth Radhakissen v. Firm of Gangaram Radha, 95 P. L. R. 1914: 23 Ind. Cas. 927 ...	194
Seth Sheolal v. Giridhari Lal, 1924 A. I. R. (Nag.) 361	31, 34, 130, 223, 299
Seth Vishnudas v. Therwerdas. 80 Ind. Cas. 642: (1925) A. I. R. (S) 18: (1925) A. I. R. (S) 72 ...	10, 13
Shaik Abdul Aziz v. Lalit Chandra, 22 C. W. N. 171 (notes)	80

TABLE OF CASES.

LIII

	PAGE.
Shaik Gholam Rahaman v. Shaikh Wahed Ali, 16 C. W. N. 859	
Shakwat Ali v. Radhamohan, 41 All. 243: 17 A. L. J. 299: 49 Ind. Cas. 816	52, 108, 109
Shamaldas Kshettry v. Phanindra Nath, 1923 A. I. R. 532 Cal: 73 Ind. Cas. 467	279
Shankar v. Vithal. 21 Bom. 45	134, 145
Sharf-uz-Zaman v. Sir Henry Stanyon, 70 Ind. Cas. 253: 25 O. C. 191: 1923 A. I. R. (O) 80	22, 298
Sharp, <i>Exparte</i> , 1893, 10 Morr. 114	219, 226
Sharp v. Jackson, L. R. 1899 App. Cas. 419	179
Shaw v. Sadiram, 9 S. L. R. 181: 32 Ind. Cas. 565	228
Sheikh Samiruddin v. Kadumoyee, 15 C. W. N. 244: 12 C. L. J. 445	173
Sheonath Singh v. Munsu Ram, 42 All. 433: 55 Ind. Cas. 941: 18 A. L. J. 449	81, 108
Sheopershad v. Miller 2 All. 475	124, 147, 225
Sheoraj Singh v. Gouri Sahay, 21 All. 227	235
	144, 161, 197, 198, 250
Shiam Saroop v. Nand Ram, 43 All. 55. 19 A. L. J. 511: 63 Ind. Cas. 366	144, 145
Shib Chunder Mullick, In the matter of, 8 B. L. R. 30	200
Shikri Prasad v. Aziz Ali, 44 All. 710: 19 A. L. J. 862: 63 Ind. Cas. 601	26, 32, 214, 226, 300
Shib Lal Rathi, <i>In Re</i> , 19 Bom. L. R. 365: 40 Ind. Cas. 207	63
Shri Goswami v. Shri Govardhan, 14 Bom. 541	71
Shukhlal v. Official Assignee, Calcutta. 34 C. L. J. 451	97
Shw Wa v. Sullivan, 15 Ind. Cas. 368	257
Siddik Ahmed v. M. K. M. Firm, 79 Ind. Cas. 813: 1923 A. I. R. (Rang) 149	6, 236
Sidebotham, <i>Exparte</i> (1880) Ch. D. 458	278, 297
Sigubalah v. Ramasamiah, 6 L. W. 283: 42 Ind. Cas. 608	286
Singer Mfg. Co. v. London & S. W. Ry. Co.. (1894) 1 Q. B. 833	19
Sinnam Chetti v. G. S. Alagiri Iyer, 1924 M. W. N. 6	63
Sinnaswami v. Aligi Goundan, 47 M. L. J. 530: (1924) M. W. N. 836: 80 I. C. 938: 1924 A. I. R. (Mad.) 893	99, 152
Sital Prasad, <i>Re</i> . 20 C. W. N. 1065.	56
Sitaram v. Beni Prasad, 84 I. C. 290	27, 33, 122
Sitaram, <i>In Re</i> . 10 Bom. H. C. 58	86
Sitaram v. Shaikh Sardar, 13 N. L. R. 215	79, 127

	PAGE.
Sitharam v. Vaithielinga, 12 Mad. 472	298
Sivaramiah v. Bhujanga, 39 Mad. 596	280, 302, 307
Sivasubramania Pillai v. Theethiappa Pillai, 45 M. L. J. 166: 1923 M. W. N. 895	157, 158, 159, 162, 181
Smith v. Allahabad Bank, 23 All. 135	8
Smith v. Coffin, (1795) 2 Hy. Bl. 444	9
Smith, <i>Exparte</i> , 2 Ch. D. 51	30
Smith v. Pearson, 1920, L. R. 1 Ch. 247	120
Srichand v. Murarilal, 34 All. 628	210
Sridhar Chowdhury v. Mugni Ram Bangar (1924) L. L. R. 3 Pat. 357: 78 Ind. Cas. 620	30, 168, 305
Sreenivasa v. Official Assignee of Madras, 25 M. L. J. 299: 1913 M. W. N. 1004: 14 M. L. T. 184	169
Sridhar Narain v. Atmaram, 7 Bom. 455	143, 144, 180, 197, 198, 250
Sridhar Narain v. Krishnaji, 12 Bom. 272	143, 197, 198, 250
Sri Kishan v. Nagoba, 76 Ind. Cas. 634	128
Srikrishna v. Emperor, 1923 A. I. R. 193 (All.)	288
Srinivasa v. Sitaram, 19 Mad. 72: 5 M. L. J. 151	208
Sripat Singh v. Maharajah Sir Prodyat Kumar Tagore, 57 Ind. Cas. 810	36, 86
Sriramulu v. Andalmal, 30 Mad. 140: 17 M. L. J. 14	130, 139, 141
Sris Chandra v. Mungi Bewa, 9 C. W. N. 14	19
Stainton, <i>Re</i> . 1887, 4 Morr. 242	185, 186
Stephen Clark v. Ruthnavello Chetty, 2 M. H. C. R. 296	194
Stick, <i>Re</i> , <i>Exparte</i> Martin, 1886, 3 Morr. 78	83
Stone, <i>Exparte</i> , 1873, 8 Ch. App. 914	156
Stuart v. Moody 1835, Cr. M & R. 777	41
Subba Aiyar v. T. S. Ramaswami, 40 M. L. J. 209: 62 Ind. Cas. 346	242, 311
Subbrayalu v. Rowlandson, 14 Mad. 134	202, 203
Subramania v. Theetheappa, 47 Mad. 120: 45 M. L. J. 166	297, 308
Sugamaniam v. Pichai, 10 Ind. Cas. 786	72
Sukrit Narain v. Raghunath, 7 All. 445	284
Summon Gope v. Raghubir, 24 Cal. 160	263
Suraj Bunsu v. Sheo Pershad, 5 Cal. 148 (P. C.)	122
Surendra v. Hari Mohan, 31 Cal. 174	263
Surendra Nath Banerjee v. Chief Justice of Bengal, 10 Cal. 78 P. C.	249
Suresh Chandra Gooyee, <i>Re</i> , 23 C. W. N. 431	251, 303
Surja v. Girindra, 79 Ind. Cas. 552	29
Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad, 14 M. I. A. 40	9, 12

TABLE OF CASES.

LV

PAGE.

T

Tabor, <i>In Re.</i>	135
Tailhie v. Official Receiver, 1883, 13 A. C. 523 ...	139
Tara Chand v. Jugal K'shore, 46 All. 713: 22 A. L. J. 684: 83 Ind. Cas. 967: 1924 A. I. R. (All.) 686	109
Tarinicharan Guha, <i>In Re.</i> 11 B. L. R. App. 25	70
Tate, <i>Exparte</i> , 35 L. T. 531 (1876)	233
Taylor, <i>Exparte</i> , <i>In Re.</i> Goldsmid, 18 Q. B. D. 295	229
Taylor v. Fields, 4 Ves. 396	11
Thakur Pershad v. Purna Lal. 35 All. 410 ...	280, 307
Thiruvengkatachariar v. Thangia Ammal, 39 Mad. 479	253, 278, 296
Thomas v. Patent Leonite Co., 17 Ch. D. 251 ...	63
Thomas Periera, <i>In Re</i> : 1 M. H. C. R. 217 ...	267
Thomson v. Cohen, 1872 L. R. 7 Q. B. 527 ...	138
Thomson, <i>Exparte</i> , 1 Atkins, 125	160
Tin ya v. Subya Pillay, 6 L. B. R. 146: 5 Bur. L. T. 277: 18 Ind. Cas. 500	107, 110
Tokee Bibi v. Abdul Khan, 5 Cal. 536 ...	98, 157, 191
Topham, <i>Exparte</i> , L. R. 17 Ch. 614	231, 232
Trenchard v. Same, 1918 L. R. 1 Ch. D. 423 ...	244
Trilokinath v. Badridas, 36 All. 250: 12 A. L. J. 355: 23 Ind. Cas. 4	68, 107, 110, 165
Trimbak Gangadhar v. Ramchandra, 63 Ind. Cas. 906: 23 Bom. L. R. 537	196
Trimbak v. Sheoram, 65 Ind. Cas. 941	129
Trustees, <i>Exparte</i> , (1923) 2 Ch. D. 1	234
Trustees of Lord Hill v. Rowlands (1886) 2 Q. B. 124	47
Tulsi Lal v. Girsham, 38 Ind. Cas. 410	272
Tulsi Ram v. Golam Mahiuddin, 10 P. W. R. 1903	109
Twyne's Case, 1601, 1 Smith's Leading Cases, 11 Ed. P. 1	42
Tynte, <i>Exparte</i> , 15 Ch. D. 125 (1880)	80

U

Ubkobin v. District Court, 3 U. B. R. 1918, 97: 49 Ind. Cas. 55	285
Udaichand Maiti v. Ram Kumar Khara, 15 C. W. N. 213: 12 C. L. J. 400	52, 67, 108, 178, 284
Umar Bahadur v. Khwaja Muhammad, 79 Ind. Cas. 56: 1924 A. I. R. 667 (Pat)	130
Umbica Nandan Biswas, <i>In the matter of</i> , 3 Cal 434: 1 C. L. J. 561	8, 26

	PAGE.
Umrao Bibi v. Syad Mahomed, 27 Cal. 205: 4	
C. W. N. 76 	263
Umrao Singh v. Punjab National Bank, 3 L. L.	
J. 44 	229, 235
Upendra v. Brindabon, 33 Ind. Cas. 188 ...	220, 226

V

Vaikunta v. Moidin, 15 Mad. 89 	298
Vardalaca Charri, <i>In the matter of</i> , 2 Mad. 15 ...	9, 126
Vasudev Kamath v. Lakshmi Narayan, 42 Mad.	
684: 36 M. L. J. 453: 52 Ind. Cas. 442 ...	5, 118
Venkat'anarayana Chetti v. Sevugan Chetty, 47	
Mad. 916: 47 M. L. J. 240: 80 Ind. Cas.	
620: 1924 A. I. R. (M) 769 ...	270
Victoria, <i>Re</i> : 1894, 2 Q. B. 387 	112
Vidanathsami v. Samasundaram, 28 Mad. 473 ...	47
Vikarppa v. Thippara, 38 Mad. 664 	119
Villayappa Chettiar v. Ramanabiram Chettiar,	
47 M. 446: 78 I. C. 1017: 46 M. L. J. 606:	
(1924) M. W. N. 163: 19 L. W. 251: (1924)	
A. I. R. (M) 529 	34, 310
Virchand v. Bulakidas, 55 Ind. Cas. 717 ...	283
Vithal v. Ramchandra, 72 Ind. Cas. 327 ...	158
Vithaldas Kalidas, <i>In the matter of</i> , 9 Ind. Cas.	
632 	67
Vythialinga Padaichi v. Ponnuswami, 41 M. L.	
J. 78: 62 Ind. Cas. 396 	252

W

Wadhawa Sing v. Emperor, 16 Cr. L. J. 272: 44	
Ind. Cas. 128 	283
Wadling v. Oliphant, (1875) 1 Q. B. D. 145 ...	129
Walcot v. Batfield, 1854 Kay 534: 101 R. R. 719	71
Walfords Estate Trustee v. Levy, (1892) 1 B. B.	
772 	212
Walker, <i>Re</i> , 1863, 3 Morr. 69 	86
Waller, <i>Ex parte</i> , L. R. 15 Eq. 412 	266
Walsh, <i>Re, Ex parte the Trustees</i> , 1885, 2 Morr.	
112 	47
Walton v. Cook, 1888, 40 Ch. D. 325 ...	177
Wansari v. Amrita, 44 Ind. Cas. 537 ...	33
Warner v. Barber, 1816 Holt, N. P. 175 ...	46
Waryam v. Wadhava, 8 P. W. R. 1918: 46 Ind.	
Cas. 588 	307
Watkins v. Customs, L. R. 8 Ch. App. 520 ...	184
Wenley, <i>Ex parte</i> , 1862, 1 De G. J. & S. 273 ...	42
West Riding Union Banking Co., <i>Ex parte, Re.</i>	
Turner, 1881, 12 Ch. D. 105 	63

TABLE OF CASES.

LVii

	PAGE.
West v. Skip, 1 Ves. 239	11
Wignell, <i>In Re. Exparte</i> Hart. 1921. 2 K. B. 835	139
Wilkinson, <i>Exparte, Re. Berry</i> , 1882, 22 Ch. D. 788	44
Wilkinson v. Gangadhar, 6 B. L. R. 486	248
William Walton, <i>In the matter of</i> , 8 C. W. N. 553: 31 Cal. 761	46, 48, 168
Wilson, <i>Re</i> , 14 L. T. 492	186
Wilson, v. United Counties Bank Ld. L. R. 1920 App. Cas. 102	129, 261
Winter Bottom, <i>Re. Exparte</i> Winter Bottom, 1886, 18 Q. B. D. 446	56
Wood, <i>Re</i> . 1872, 7 Ch. App. 302	42 43
Woonwalla & Co. v. N. C. Macleod, 30 Bom. 515: 8 Bom. L. R. 470	257
Worsley v. De Mattos, 1758 1 Bur. 467	43
Wright, <i>In Re</i> , 1915 App. Cas. 717	71
W. Tucker, <i>Re. Exparte</i> J. W. Tucker, 1895 2 Mans. 358	58

Y

Yaramati Krishayya v. Chandra Papayya, 20 Mad. 326	43
Yyappe v. Munick Ameri, 40 Mad. 630	283

THE PROVINCIAL INSOLVENCY ACT, 1920

(V OF 1920.)

CONTENTS.

SECTIONS.

1. Short title and extent.
2. Definitions.

PART I.

CONSTITUTION AND POWERS OF COURT.

3. Insolvency jurisdiction.
4. Power of Court to decide all questions arising in insolvency.
5. General powers of Courts.

PART II.

PROCEEDING FROM ACT OF INSOLVENCY TO DISCHARGE.

Acts of Insolvency.

6. Acts of Insolvency.

Petition.

7. Petition and adjudication.
8. Exemption of corporation, etc., from insolvency proceedings.
9. Conditions on which creditor may petition.
10. Conditions on which debtor may petition.
11. Court to which petition shall be presented.
12. Verification of petition.
13. Contents of petition.
14. Withdrawal of petition.
15. Consolidation of petitions.
16. Power to change carriage of proceedings.
17. Continuance of proceedings on death of debtor.
18. Procedure for admission of petition.
19. Procedure on admission of petition.
20. Appointment of interim receiver.
21. Interim proceedings against debtor.
22. Duties of debtors.
23. Release of debtor.
24. Procedure at hearing.
25. Dismissal of petition.
26. Award of compensation.

SECTIONS.

Order of Adjudication.

27. Order of adjudication.
28. Effect of an order of adjudication.
29. Stay of pending proceeding.
30. Publication of order of adjudication.

Proceedings consequent on order of adjudication.

31. Protection order.
32. Power to arrest after adjudication.
33. Schedule of creditors.
34. Debt provable under the Act.

Annulment of Adjudication.

35. Power to annul adjudication of insolvency.
36. Power to cancel one of concurrent order of adjudication.
37. Proceedings on annulment.

Compositions and schemes of arrangement

38. Compositions and schemes of arrangement.
39. Order on approval.
40. Power to re-adjudge debtor insolvent.

Discharge.

41. Discharge.
42. Cases in which Court must refuse an absolute discharge.
43. Adjudication to be annulled on failure to apply for discharge.
44. Effect of order of discharge.

PART III.

ADMINISTRATION OF PROPERTY.

Method of proof of debts.

45. Debt payable at a future time.
46. Mutual dealings and set-off.
47. Secured creditors.
48. Interest.
49. Mode of proof.
50. Disallowance and reduction of entries in schedule.
Effect of insolvency on antecedent transactions.
51. Restriction of rights of creditor under execution.
52. Duties of Court executing decree as to property taken in execution.
53. Avoidance of Voluntary transfer
54. Avoidance of preference in certain cases.

SECTIONS.

Release of Property.

- 55. Protection of *bona-fide* transactions.
- 56. Appointment of receiver.
- 57. Power to appoint Official Receivers.
- 58. Powers of Court if no receiver appointed.
- 59. Duties and powers of receiver.
- 60. Special provisions in regard to immoveable property.

Distribution of Property.

- 61. Priority of debts.
- 62. Calculation of dividends.
- 63. Right of creditor who has not proved debt before declaration of a dividend.
- 64. Final dividend.
- 65. No suit for dividend.
- 66. Management by and allowance to insolvent.
- 67. Right of insolvent to surplus.

Appeal to Court against receiver.

- 68. Appeal to Court against receiver.

PART IV.

PENALTIES.

- 69. Offences by debtors.
- 70. Procedure on charge under section 69.
- 71. Criminal liability after discharge or composition.
- 72. Undischarged insolvent obtaining credit.
- 73. Disqualifications of insolvent.

PART V.

SUMMARY ADMINISTRATION.

- 74. Summary administration.

PART VI.

APPEALS.

- 75. Appeals.

PART VII.

MISCELLANEOUS.

- 76. Costs.
- 77. Courts to be auxiliary to each other.
- 78. Limitation.
- 79. Power to make rules.
- 80. Delegation of powers to Official Receivers

SECTIONS.

81. Power of Local Government to bar application of certain provisions to certain Courts.

82. Savings.

**SCHEDULE I DECISIONS AND ORDERS FROM WHICH AN
APPEAL LIES TO HIGH COURT UNDER
SECTION 75 (2).**

**SCHEDULE II PROVISIONS OF THE ACT APPLICATION
OF WHICH MAY BE BARRED BY LOCAL
GOVERNMENTS.**

SCHEDULE III ENACTMENTS REPEALED.

COMPARATIVE TABLES.

Shewing corresponding Sections of Act V of 1920 and Act III of 1907
and *Vice versa*.

Section in Act V. of 1920.	Section in Act III of 1907.	Section in Act III of 1907.	Section in Act V. of 1920.
1	1	1	1
2	2	2	2
3	3	3	3
4	New	4	6
5	47	5	7
6	4	6 (1)	12 & 18
7	5	6 (2)	11
8	6 (6)	6 (3)	10
9	6 (4) and (5)	6 (4)	9 (1)
10	6 (3)	6 (5)	9 (2)
11	6 (2)	6 (6)	8
12	6 (1)	7	14
13	11	8	15
14	7	9	16
15	8	10	17
16	9	11	18
17	10	12	19
18	6 (1)	13	21
19	12	14	24
20	New	15 (1)	25
21	13 (1) (3) & (4)	15 (2) (3)	26 (1) (2)
22	43 (1)	16 (1)	27
23	New	16 (2) (3) (4) (5) (6)	28
24	14	16 (7)	30
25	15 (1)	17	36
26	15 (2) and (3)	18	56
27	16 (1)	19	57
28	16 (2), (3), (4), (5) and (6)	20	59
29	New	21	60
30	16 (7)	22	68
31	New	23	58
32	New	24	33
33	24	25	49
34	28	26	50
35	42 (1)	27	38, 39 & 40
36	17	28	34
37	42 (2) and (3)	29	45
38	27 (1), (2), (3) (4) (5), (6) & (9)	30	46
39	27 (7)	31	47
40	27 (8)	32	48
41	44 (1) and (2)	33	61
		34	51
		35	52

Comparative Tables—continued.

Section in Act V. of 1920.	Section in Act III of 1907.	Section in Act III of 1907.	Section in Act V. of 1920.
42	44 (3) (4) & (5)	36	53
43	New	37	54
44	45	38	55
45	29	39	62
46	30	40	66
47	31	41	67
48	32	42	35
49	25	43	22 & 69
50	26	44	41
51	34	45	44
52	35	46	75
53	36	47	5
54	37	48	74
55	38	49	76
56	18	50	77
57	19	51	79
58	23	52	80
59	20	53	72
60	21	54	81
61	33	55	82
62	39 (1) and (2)	56	Schedule III.
63	39 (3)		
64	39 (4)		
65	39 (5)		
66	40		
67	41		
68	22		
69	<i>Cf.</i> 43 (2)		
70	New		
71	New		
72	53		
73	New		
74	48		
75	46		
76	49		
77	50		
78	New		
79	51		
80	52		
81	54		
82	55		
83	56		

The
PROVINCIAL INSOLVENCY ACT

Act No. V of 1920.

PASSED BY THE INDIAN LEGISLATIVE COUNCIL.

*Received the assent of the Governor-General on the
25th February, 1920.*

An Act to consolidate and amend the Law relating to Insolvency in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the Town of Rangoon.

“**Amend.**”—A Bill to amend the Provincial Insolvency Act, 1907, was introduced in the Imperial Legislative Council on the 4th September 1918 “in order that it might take the place of the rudimentary provisions for dealing with the insolvents outside the presidency towns which were contained in the Act.” The Bill was referred to a Select Committee and the Report of the Select Committee to amend the Provincial Insolvency Act, 1907, was presented to the Council on the 11th February, 1920. The Bill received the assent of the Governor-General on the 25th February, 1920. For Statement of Objects and Reasons, Proceedings in Council, Report of Select Committee, *vide supra*.

N B—*Italics in the body of the sections indicate new or amended matter. The figures within square brackets next to the number of the sections indicate corresponding sections under Act III of 1907.*

WHEREAS it is expedient to consolidate and amend the law relating to insolvency in British India, as administered by Courts having jurisdiction outside the Presidency-towns and the Town of Rangoon; It is hereby enacted as follows:—

1 [1] (1) This Act may be called the Provincial Insolvency Act, 1920.

(2) It extends to the whole of British India, except the Scheduled Districts.

Presidency Towns.—The law of insolvency as administered in the Presidency Towns before 1909 was the Indian Insolvency Act of 1848, (11 and 12 Vict. C. 21). The Presidency Towns Insolvency Act, III of 1909 was passed in 1909 in complete supercession of 11 and 12 Vict. C. 21, and it applies to the Presidency Towns, *viz.*, Calcutta, Madras, and Bombay, and the town of Rangoon, and the Court having jurisdiction in insolvency under this Act are (1) the High Courts of Judicature at Fort William, Madras and Bombay and (2) the High Court, Rangoon.

Outside the Presidency Towns and Rangoon.—The law of insolvency as administered in places *outside* the local limits for the time being of the towns of Calcutta, Madras, Bombay and Rangoon up to the year 1907, was contained in Chapter XX of the C. P. Code, 1882, Sections 344-360. The Provincial Insolvency Act, III of 1907, was passed in 1907, in complete supercession of Chapter XX of the C. P. Code; 1882, Sections 344-360, and the provisions relating to insolvency were omitted from the C. P. Code, V of 1908. The Act III of 1907 remained in force till 25th February, 1920, and the present Act V of 1920 having received the assent of the Governor General in Council on the 25th February, 1920, has now become the law of insolvency in British India, outside the Presidency Towns, Rangoon, and the Scheduled Districts.

Extent.—It extends to the whole of British India except (1) the Presidency Towns, (2) the town of Rangoon and (3) the Scheduled Districts.

Operation.—The Act is silent as to the date from which it is to come into operation. But under Section 5 of the General Clauses Act X of 1887 which provides "where an Act of the Governor-General in Council is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent of the Governor-General," the New Act, V of 1920, comes into force from the 25th February, 1920, having received the assent of the Governor-General on that date.

Retrospective Effect.—In *Promotho Nath Pal Choudhury v. Saurav Dasi Choudhurani*, 24 C. W. N. 1011, it has been laid down that "the rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice; and it has been repeatedly laid down that in the absence of clear word to that effect

a statute will not be construed so as to take away a vested right of action acquired before it was passed, *Budhu Koer v. Hafiz*, 18 C. L. J. 274; and *Gopeswar v. Jibanchandra*, 41 Cal. 1125: 18 C. W. N. 804: 19 C. L. J. 549." The provisions of the Provincial Insolvency Act, 1920, have no application to a petition to adjudicate a debtor an insolvent made under the Provincial Insolvency Act, 1907, which was pending when the Act of 1920 came into force; nor can the discretion given to the Court statedly in applications made under the Act of 1920 be extended to applications made under the Act of 1907. *Pulpati Hanumaya v. Ravuri Ramayya*, 41 M. L. J. 126: 1921 M. W. N. 381: 64 Ind. Cas. 270. But all orders passed after the commencement of this Act are subject to appeal or revision according to the provisions of the new Act although the adjudication had been made before it came into force. *Chunilal v. Biharlal*, 21 P. W. R. 1916: 38 Ind. Cas. 995. Even though a petition was presented when the old Insolvency Act, III of 1907, was in force, the new Act, V of 1920 is applicable as soon as it is passed even in respect of such application. Any order passed under the old Act or rights obtained thereunder will be unaffected by the new Act, *Rangiah Chettiar v. Annasami Alwar Ayyangar*, 1923 M. W. N. 840: 79 Ind. Cas. 408: 1924 A. I. R. (Mad.) 368.

British India.—According to Section 3, cl. 7 of the General Clauses Act, X of 1897, "British India shall mean all territories, and places within His Majesty's Dominion which are, for the time being, governed by His Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General."

Scheduled Districts.—"Scheduled Districts" means the territories mentioned in the First Schedule of the Scheduled Districts Act, XIV of 1874, viz.:—

Bengal Presidency.—Jalpaiguri and Darjeeling Divisions, The Hill Tracts of Chittagong, The Santhal Pergunnahs, The Chutia Nagpur Division and Mahal of Angul.

Bombay Presidency.—Sindh, Aden, certain villages of some of the Mehwasi Chief.

Central Provinces.—The Zemindaris of Kattisgarh and Chanda, Jaigirdaris of Chindwara.

Madras Presidency.—The Maliahs in Ganjam, The Jeypur Zemindari and certain Maliahs and other Muttas and Golconda Hills in the Vizagapatam District. The Bhadrachalam Taluk, the Rakapilli Taluk

and the Rampa country in the Godaveri District. The Laccadive Islands including Minicoy in the Indian Ocean.

United Provinces.—Kumaon and Garwal, the Terai Pergunnahs comprising Bazpur, Kashipur, Jaspur, Rudarpur, Gudarpur, Kilpuri, Nanak-Mattha, and Belheri. Some tracts in the Dehra-Dun District and some Tappas in the Nirzapur District.

N. W. F. Provinces.—Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan.

Punjab.—Dera Ghazi Khan, Labaul and Spiti Districts.

Miscellaneous.—The Chief Commissionerships of Coorg of the Andaman and Nicobar Islands, of Ajmer and Merwara and Assam, The Hill Tracts of Arakan and the Pergunnahs of Manipur.

2. [2] (1) In this Act, unless there is any-
Definitions. thing repugnant in the subject
or context,—

- (a) “creditor” includes a decree-holder,
“debt” includes a judgment-debt. and
“debtor” includes a judgment-debtor;
- (b) “District Court” means the principal
Civil Court of original jurisdiction in
any area outside the local limits for
the time being of the Presidency-
towns and of the Town of Rangoon;
- (c) “prescribed” means prescribed by rules
made under this Act;
- (d) “property” includes any property over
which or the profits of which any per-
son has a disposing power which he
may exercise for his own benefit;
- (e) “*secured creditor*” means a person hold-
ing a mortgage, charge or lien on the
property of the debtor or any part
thereof as a security for a debt due to
him from the debtor; and
- (f) “*transfer of property*” includes a transfer
of any interest in property and the
creation of any charge upon property.

(2) Words and expressions *used in this Act and defined in the Code of Civil Procedure, 1908, not herein before defined* shall have the same meanings as those respectively *attributed to them by the said Code.*

NOTES.

Review.—This section has been recast. It includes the definition of “transfer of property” and excludes those of “available act of insolvency” and “Court.” The reasons for the changes introduced in the section are explained in Clause (2) of Notes on Clauses, *supra*, thus:—“The expression “available act of insolvency” is not used anywhere else in the Act, and a definition therefore seems unnecessary. No such definition is to be found in the Presidency Towns Insolvency Act. The amendment in the definition of “property” makes it clear that trust property is not to be dealt with under the Act as property of the insolvent. It is proposed to include a definition of the expression “transfer of property” on the lines of the definition in Section 2 of the Presidency Towns Act.”

Clause (a).—“The word **creditor** is not defined by the Act. The word *creditor* means one that can compel the performance of an obligation by another person who is called the *debtor*, the person lying under an obligation. In Wharton’s Law Lexicon creditor is said to be correlative to debtor and debtor is defined as he that owes something to another.

A creditor may be a decree-holder or otherwise; *Vasudev Kamath v. Lakshmi Narayan*, 42 Mad. 684; 36 M. L. J. 453; 52 Ind. Cas 442. The ‘creditor’ includes a person who has obtained judgment in respect of a tort as well as of a debt, *Ex parte Moore*, 14 Q. B. D., 627. A decree-holder, who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies is not a ‘creditor’ under the Provincial Insolvency Act in respect of his rent or decree. His decree is not a proveable debt, *Parbati v. Raja Shyamrikh*, 20 A. L. J., 147; 44 All. 296, following *Kolka Das v. Gajju Sing*, 43 All. 510.

Contingent Creditor.—“The person who on the happening of certain contingencies which may or may not happen will become entitled to enforce an obligation then created against another person cannot be called a creditor. A surety is a contingent creditor.” *Nalam Viswanatham v. Official Assignee*, 32 Ind. Cas. 795. But a person who stands surety for the payment of a debt of the insolvent is a ‘creditor’

within the meaning of this section. *Rodrigues v. Ramaswami*, 40 Mad. 783. A surety, as such, is clearly, a creditor of the insolvent. He is clearly a creditor as soon as he pays the money on his behalf. *Siddik Ahmed v. M. K. M. Firm*, 79 Ind. Cas. 813: 1923 A. I. R. (Rang.) 149.

Benamidar.—Though the term *creditor* was held not to include a *benamidar* of the creditor in *Ketaki Charan v. Saratkumari*, 20 C. W. N. 995, it has since been held by the Privy Council in *Chowdhri Gur Narain v. Sheo Lal Sing*, 46 Cal. 566: 23 C. W. N. 521 that the *benamidar* represents the real owner, and is, so far as their relative legal position is concerned, a mere trustee for him, and there is no reason why an action cannot be maintained in the name of the *benamidar* in respect of the property although the beneficial owner is no party to it, a proceeding by or against the *benamidar* being in its ultimate result fully binding on the beneficial owner. It therefore appears that the view held in *Ketaki Charan v. Saratkumari* has to be revised in the light of the Privy Council decision.

Debt.—The word debt is used in its ordinary meaning of a sum payable in respect of a money demand recoverable by action, *Derasami v. Vaithilinga*, 40 Mad. 31 (F. B.): 1917 M. W. N. 353: 32 M. L. J. 422. A right to receive a debt is property within the meaning of Section 2 (d) and vests in the *Receiver*. *Onkarso v. Bridichand*, 73 Ind. Cas. 1037: 1923 A. I. R. 290 (Nagpur). Debt within the meaning of the Insolvency Act means *only those debts that are provable under the Act under section 34. Vides notes thereunder.*

Clause (b).—Court was defined in the old Act as “the Court exercising jurisdiction” under Act III of 1907. This definition has been omitted because under Section 3 of the present Act, it is the District Court that shall be the “Courts having jurisdiction under this Act and “District Court” has been defined in Section 2, sub-section (1) cl. (b).”

In section 3 (15) of the General Clauses Act, X of 1897, *District Judge* has been defined “the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction” and under Section 18 of the Bengal, N. W. P. & Assam Civil Courts Act XII of 1887, the jurisdiction of a District Judge extends to all original suits for the time being cognisable by Civil Courts.

Clause (c).—For Rules vide Sections 79 and 80 infra and appendices.

Clause (d).—Property. The definition of the word “property” in Sec. 2 (d) is not exhaustive. It was inserted to make it clear that certain kinds of property which do not actually belong to the insolvent are to be treated as his property for the purpose of the Insolvency Act, *e.g.*, property over which he may have a power of appointment exercisable for his own benefit. Under Sec. 28 (5) of the Provincial Insolvency Act the property which is exempted from the scope of adjudication is property of the insolvent which is exempted from attachment in execution of a decree under Sec. 60 of the C. P. Code.

The word ‘Property’ includes (a) moveable property, (b) immoveable property, and (c) actionable claims. Blackstone in his Commentaries defines ‘property’ to mean all “*subjects of dominion*,” and they are things as distinguished from persons; and things are distinguished into two classes, *things real* and *things personal*. Things real (otherwise called realty) consist of things substantial and immoveable, of the rights and property annexed to or arising out of these. Things personal (otherwise called personalty) consist of goods, money, all other moveables and of such rights and profits as relate to moveables.

In Section 16 of the Bankruptcy Act, 1883, 46 & 47 Vict. C. 52 the word has been defined as “Property shall include money, goods, things in action, land and every description of property, whether real or personal, and whether situated in England or otherwise: also obligations, easements and every description of estate, interests and profits, present or future, vested or contingent, arising out of or incident to property above defined.”

“Includes”.—When in a interpretation clause, it is stated that a certain term “includes” so and so, the meaning is that the term retains its ordinary meaning and the clause enlarges the meaning of the terms made makes it include matters which the ordinary meaning would not include. *The Official Assignee, Bombay v. Firm of Chandulal Chimanlal*, 76 Ind. Cas. 657.

Claim For Damages.—The word property under the English Insolvency Law includes claims in the nature of damages which have accrued due prior to the date of insolvency, *except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt, or from injury to his person or reputation*. *Brake v. Beekhan* 60 R. R. 691; *Rogers v. Spencer*, 67 R. R. 736. Any property or interest in property which a person can in law or in equity transfer or assign or dispose of *inter vivos*, or by testamentary instrument can be affected

by him with a trust by an instrument *inter vivos* or testamentary instrument provided the object of the trust is legal, is lawful. Sec. 6 (e) of the T. P. Act does not prevent assignment of the whole estate of the assignor with an incidental remedy for its recovery, but prohibits the transfer of a bare right to sue. A claim for breach of contract which has become due to the insolvent prior to his insolvency and has not been paid to him vests in the Official Receiver, *Motiram Doulatram v. Pahlaj Rai Gopaldas*, 80 Ind. Cas. 141: (1925) A. I. R. (S.) 159. The right to claim damages resulting from breach of contract before the adjudication of insolvency vests in the Official Receiver. A right of action in respect of a tort or a breach of contract resulting in injuries wholly to the *person or feelings* of the bankrupt does not pass to the trustee for his creditors, but remains *in the bankrupt*. But a right of action in respect of a tort or breach of contract resulting in injuries wholly to the *estate* of the bankrupt passes to the trustee to his creditors. "A mere right to sue" is restricted to damages arising from bodily or mental suffering or injury to the person or reputation of the bankrupt as contradistinguished from injuries to his estate, and the latter vests in the Official Assignee on the adjudication of insolvency both under the Presidency Towns and the Provincial Insolvency Act. *Official Assignee, Bombay v. Firm of Chandulal Chimanlal*, 76 Ind. Cas. 657.

Commission Agent.—*In Re Messrs. Kadibhoy Ismailji Lotia*, 11 Ind. Cas. 14, it was held that where a Commission Agent had disposing power over goods entrusted to him for sale, such goods were his property within the meaning of the Insolvency Act, and an *ad interim* receiver can take possession of them. See also *Smith v. Allahabad Bank*, 23 All. 135.

Property includes personal earnings.—*Jumnudas v. Vinyak*, 10 Ind. Cas. 698. Secret formulas invented by a manufacturer are part of the goodwill and assets of his business and therefore his property. *In Keene*, (1922) 2 Ch. D. 475. *In the matter of Umbica Nandan Biswas*, 3 Cal. 434: 1 C. L. R. 561, it was held that the word *property* in Section 26 of the Insolvency Act, included money. Property includes salary, *Ram Chandra v. Shama Charan*, 18 C. W. N. 1052: 19 C. L. J. 83.

Trust property cannot be dealt with under the Act as the property of the insolvent in as much as he has not the disposing power over it which he may exercise for his own welfare, *In the matter of Var-*

dalaca Charri, 2 Mad. 15. See also Sec. 44 (1) of the Bankruptcy Act 1883 and *Smith v. Coffin*, (1795) 2 Hy. Bl. 444; *Scott v. Surman*, 1743 Wiles 400.

Nor does it include sovereigns and gold entrusted to a jeweller to be made into ornaments, *Raja Mulraju v. Official Assignee, Madras*, 28 M. L. J. 403; 29 Ind. Cas. 37.

Vide also Notes under section 28 (2) infra.

Landlord and Tenant.—Statutory Tenancy.—A statutory tenancy is “property.” The plaintiffs having let to the defendant a dwelling house the defendant retained possession of it after the expiration of the term. The defendant was afterwards adjudicated bankrupt and the trustee in bankruptcy disclaimed any interest in the house. In an action by the plaintiff against the defendant bankrupt for possession of the house and mesne profits, held, that the statutory tenancy to which the defendant became entitled was “property” within the meaning of the Sec. 167 of the Bankruptcy Act, 1914, and passed under Sec. 53 to his trustee in bankruptcy, that on disclaimer thereof by the trustee that interest in the property ceased to exist and was no longer available for the benefit of the defendant, and consequently that the plaintiffs were entitled to judgment, *Parkinson & ors. v. Noel*, (1923) 1 K. B. D. 117. A monthly tenant of certain premises remained in possession thereof after being adjudicated insolvent. The Official Assignee having disclaimed interest, the landlord applied to the Insolvency Court by motion, for an order for possession. Held, following *Parkinson & ors. v. Noel*, that the statutory tenancy was the property of the insolvent and the disclaimer of the Official Assignee having put an end to the interest of the insolvent therein, the property reverted to the landlord, and the latter was entitled to an order for possession. *In re Abu Baker Haji Abdulla*, 48 Bom. 580; 26 Bom. L. R. 628

Partnership Assets.—There is a great conflict of judicial opinion as to whether the share of a partner in the joint assets is property within the meaning of the Sec. and is liable to attachment and sale in execution of decree. Or. XXI, r. 49, C. P. Code, 1908, provides that “save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree *other than a decree passed against the firm or against the partners in the firm as such*,” and the Privy Council held, in *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad*, 14 M. J. A. 40; followed in *Dwarika*

Mohun Das v. Lukhimony Dasi, 14 C. 384; and also in *Bibee Tokai-sherob v. Davod Mullick*, 6 M. I. A. 510, that the expectant claim of a partner in a partnership business was not property and not saleable in execution of a decree. It has, however, been held by the same Board that a partner's share in the assets of a partnership concern is "property" and is liable to attachment and sale in execution of a decree. *Din Dayal Lal v. Jugdeep Narain Singh*, 4 I. A. 247: 3 Cal. 198 P. C.; *Parvatheesam v. Bapanna*, 13 Mad. 447; *Jagat Chandra Roy v. Issur Chunder Roy*, 20 Cal. 693. The definition of the word property in Sec. 2 (d) is very comprehensive and includes any property over which or over the profits of which the insolvent has a disposing power which he may exercise for his own benefit. All rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of his debts including claims in the nature of damages except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation are "property" which vests in the Official Receivers. Under Sec. 28 of the Act it is the whole property of the insolvent that vests in the Receiver and not only that which can be attached and sold in execution of a decree. The assignment of a share in the assets of a firm is not the assignment of a mere or bare right to sue but of the share of the assets of the firm with the individual right of recovering the same by the aid of the Court. It is for the Court in such particular case to decide whether in the view of the Court the assignment in dispute is property with an incidental remedy for its recovery, or it is a bare right to bring an action within the meaning of Sec. 6 (e) of the T. P. Act. *Jewan Ram v. Ratan Chand*, 70 Ind. Cas. 498: 26 C. W. N. 285; *Seth Vishnudas v. Therwerdas*, 80 Ind. Cas. 642: (1925) A. I. R. (S.) 18: (1925) A. I. R. (S.) 72 though, the determination of the question is exceedingly difficult *Nazir Hossan v. Matin-uz-Zaman*, (1925) A. I. R. (O) 299. The view that the share of a partner is property as can be attached under the Civil Procedure Code and would vest in the Official Receiver found favour in *Ramanatha Aiyar v. Nagindra Aiyar*, 1924 A. I. R. (Mad.) 223. The question presents no difficulty when all the partners of the firm, i.e., the whole firm is adjudicated insolvent. Then the assets of the whole firm would vest in the Receiver as a matter of course, and would be distributed to the creditors in the manner laid down by Sec. 61

of the Act. The difficulty arises when only one or some of the members of the firm, but not all, is or are declared insolvents. Then the question arises, would the share of the insolvent partner or partners in the joint assets of the partnership business vest in the Receiver? Lindley L.J. in his *Partnership* says "when one of several partners is adjudicated bankrupt, his trustee becomes entitled to all his separate property; but subject to the qualifications (as in cases of voluntary conveyance and fraudulent preference) the trustee can claim no more than the bankrupt himself would have been entitled to had he not become bankrupt, and every lien available for his co-sharers against him would be equally available for them against his trustee. Consequently his trustee could claim nothing as the bankrupt's share until all the joint-creditors have been paid, (*Taylor v. Fields*, 4 Ves. 396; *Holderness v. Shackles*, 8 B. & C. 612; *Richardson v. Gooding*, 2 Vern. 293), and the partnership accounts have been duly taken and adjusted, *West v. Skip*, 1 Ves. 239. The trustee, therefore, of a bankrupt partner is entitled to an account, *Crostray v. Collins*, 15 Ves. 218. It is settled that the joint-creditor shall be paid out of the partnership or joint estate and the separate creditor out of the separate estate of each partner, and if there be any surplus, the same shall be applied to pay the other creditors, vide Sec. 262 Indian Contract Act and Sec. 61 (4) of the Provincial Insolvency Act. Joint creditors have therefore the first claim for payment out of the joint estate, and until they have been paid, the principal monies due to them with interest thereon at the date of the receiving order, no other person is entitled to receive a farthing out of the assets of the firm. When therefore only a partner or some of the partners become insolvent the Receiver becomes a tenant-in-common with the continuing partners from the date of the petition, *Barker v. Goodair*, 11 Ves. 78. The solvent partners have the right to realise the partnership property, *Fox v. Hunbury*, Coup. 445. The Receiver of an insolvent partner, there being solvent partners, cannot obtain the proceeds of an execution levied against the partnership assets for a joint-debt, *Brickwood v. Miller*, 3 Mar. 279.

In India, there is a considerable divergence of judicial opinion as to whether the share of a bankrupt partner in the partnership assets vests in the Receiver. The question has been attempted to be solved from two points of view, *first*, as to whether a partner has a disposing power over his undivided assets in his partnership business as contemplated in Sec. 2 (1) d, and *secondly*, whether his share in the

joint assets of the partnership can be attached and sold in execution of a decree.

(1) *Disposing Power of a Partner*.—Sec. 253, Indian Contract Act, provides that, in the absence of any contract to the contrary, no person can introduce a new partner in the firm without the consent of all the partners. And if, from any cause, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members. A partner may give to a third person interest in his share of the partnership but cannot make him a partner, *Bray v. Fromant*, 22 R. R. 224. The Judicial Committee of the Privy Council has held in *Din Doyal Lal v. Jugdeep Narain Sing*, 4 I. A. 247: 3 Cal. 198, that the partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners. Therefore the assignment of a share in the assets of a firm, in the absence of a contract to the contrary, is the assignment of a mere bare right to sue (for dissolution and accounts) within the meaning of Sec. 6 (e) of the T. P. Act which is not assignable. The partner's power to dispose of his share in the joint assets is therefore not absolute but *conditional* on his having assigned also his right of recovery of his share after dissolution and accounts. Sec. 2 (d), on the other hand, contemplates an absolute and unconditional power of disposal, *Sat Narain v. Behari Lal*, 51 I. A. 22: J. L. R. 6 (Lahore) 1: 47 M. L. J. 857: 1925 A. I. R. 18 P. C.

(2) *Can the undivided share of a partner in the joint assets of a firm be attached and sold in execution of a decree?* There is a great deal of controversy going on so far as this question is concerned. Or. XXI, r. 49, C. P. Code lays down that partnership assets cannot be attached and sold in execution of a decree unless the decree is against the firm. It has been pointed out by the Privy Council in *Syud Tuffuzool Hosain v. Raghunath Pershand*, 14 M. I. A. 40; followed in *Dwarika Mohan Das v. Lakhimoni Dasi*, 14 Cal. 384, that the expectant claim of a partner in a partnership business was not *property*, and not saleable in execution of a decree though the same Board has held in *Din Doyal v. Jugdeep Narain*, 4 I. A. 247: 3 Cal. 198 P. C., that though "a partner could not have sold his share so as to introduce a stranger to the firm without the consent of his co-partners, the purchaser at an execution sale, acquires the interest sold with the right to have his partnership accounts taken in order to ascertain and realise them." Though there are authorities for the proposition that

a partner's share in the joint assets of a partnership business is not attachable in execution of a decree against him, under Sec. 60, C. P. Code, in as much as what is sought to be attached is the assets of a judgment-debtor as yet unascertained, and it has been held that until the dissolution of partnership takes place and the judgment-debtor's share in the partnership assets is ascertained such share could not be treated as a debt attachable in execution of a decree (*Abbot v. Abbot*, 5 B. L. R. 282), a contrary view, however, has been held in *Parvathesam v. Bapanna*, 13 Mad. 447; *Jagat Chandra v. Iswar Chandra*, 20 Cal. 693, and other recent cases, viz., *Jivan Ram v. Ratan Chand*, 26 C. W. N. 285: 70 Ind. Cas. 489; *Seth Vishnudas v. Tharwerdus*, 80 Ind. Cas. 642: 1924 A. I. R. (Sind) 18: 1925 A. I. R. (Sind) 92; *Ramanatha Iyer v. Nagindra Aiyar*, 1924 A. I. R. (Mad.) 223. The principle underlying these decisions is that the share of a partner in the partnership assets has not been altogether excluded from attachment under Sec. 60, C. P. C., and it is attachable under Or. XXI, r. 49, though under certain circumstances. The above cases overlook the distinction as pointed out by their Lordships of the Judicial Committee in *Sat Narain v. Behari Lal*, 52 I. A. 27: I. L. R. 6 (Lahore) 1: 47 M. L. J. 857: 1925 A. I. R. 18 P. C., that Sec. 2 (1) (d) contemplates *absolute* power of disposal *without any qualification*, and also the point that if his share in the joint assets of the partnership is not available to his separate creditors it is not available to the Receiver for distribution to the general body of creditors, unless dissolution and accounts are taken and unless the joint-creditors have been paid in full.

Hindu Joint Family Property.—From the earliest times downwards it has been uniformly held in a long series of cases that the right, title and interest of a Hindu co-sharer in joint-family may be attached and sold in execution of a decree obtained against him personally. Therefore, such right, title and interest is "property" of the insolvent, which vests in the Receiver in insolvency, and the Receiver is entitled to sue for partition thereof. *Lal Bahadur v. Paspat Prosad*, 74 Ind. Cas. 301: 1923 A. I. R. 154 (Oudh) though otherwise held in *Anant Singh v. Kulka Singa*, 5 O. L. J. 664: 48 Ind. Cas. 526. Under the Mitakshara Law a father has a right to dispose of his son's interest in ancestral immoveable property for the payment of his own debt, not contracted for immoral purpose. Such interest, therefore, is "property" within the meaning of Sec. 2 (d). *Chella-*

ram v. Official Receiver, 1923. A. I. R. 20 (Sind). In a Mitakshara family, if a father is declared insolvent for debts not contracted for immoral purposes, then the whole interest of the father as well as of the sons vests in the Receiver, *Hurmukh Roy Munno Lal v. Radha Mohan*, 54 Ind. Cas. 931. *Nurasimul v. Basava Sankaram* (1925) A. I. R. (M.) 249. *Narain Das v. Bankim Chandra* 85, I. C. 396.

Though a different view was adopted in *Sant Singh v. Shew Dut Singh*, I. L. R. 2 Pat. 724, the Patna High Court has in the recent case of *Amolak Chand v. Mansukhrai Mangan Lal*, I. L. R. 3 Pat. 857: 1925 A. I. R. (P.) 127: 85 Ind. Cas. 88, come into line with the views held by other High Courts by dissenting from the view of *Sant Singh v. Shew Dut Singh*, and has held that where the father of a joint Hindu family and his two major sons were engaged in business which proved unsuccessful and they were adjudged insolvents, the ancestral property is 'property' within the meaning of Sec. 2 (1) (d) and is liable to be sold in satisfaction of antecedent debts including the shares of the minors.

Departure from old law.—The Privy Council, however, in the recent case of *Sat Narain v. Behari Lal*, 52. I. A. 22: I. L. R., 6 Lahore 1: 47 M. L. J. 857: 1925 A. I. R. (P. C.) 18, in appeal from *Behari Lal v. Sat Narain*, I. L. R. 3 Lahore 329, held that the property of an insolvent which vests in the Receiver means only the property which is divisible amongst his creditors, and it is wrong to say that when a Hindu who happens with his sons to constitute a joint family subject to the law of Mitakshara is adjudged an insolvent, not only his own rights but also the rights and interests of his sons who are his co-parceners in joint family property vests in the Receiver by virtue of the adjudication alone. It may be that the joint family property may in a proper case be made available for the payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the Receiver. It is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interest in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute but conditional on his

having debts which are liable to be satisfied out of that property. Sec. 2 (1) (d) seems to contemplate an absolute and unconditional power of disposal.

For fuller description of "property" *vide* notes under Sec. 28 *infra*.

Clause (e).—Secured and Unsecured Creditors.—Secured creditor means a creditor who has got security for his debt, *i.e.*, who can follow the property of the debtor for the realisation of his debts either in the hands of the debtor or in the hands of his assignees in preference to all other claims and as against the unsecured creditors who can follow only the person of the debtor and the residue of the property, if any, that may be left after payment of the secured creditor. The property by which the debt of a creditor is secured is called "security." Under section 168 (1) of the Bankruptcy Act, 1883, secured creditor means "a person holding a mortgage, charge or lien on property of the debtor or any part of his property as security for a debt due to him from the debtor."

The definition given in the Act includes charges (1) on land for arrears of rent (2) for maintenance (3) for public dues (4) for Crown debts (5) all salaries or wages not exceeding Rs. 20 of any clerk or servant or labourer in respect of services rendered to the insolvent during 4 months before the date of the presentation of the petition and (6) all other claims which are made charges under any *special* law for the time being in force.

Mortgage, charge or lien.—The term "charge" corresponds with the term "lien" which in England is defined to be an obligation which by implication of law and not by express contract binds the real or personal estate for the discharge of a debt or engagement but does not pass any property in the subject of the lien. Fisher, S. 466, *Wilson v. Hitcher*, 5 Taunt, 649. But while a charge may be created by act of parties, a lien is created only by operation of law. The term appears to have been used in this sense in Sec. 95 of the Indian Contract Act, IX of 1872, but applicable only to movable property. The term "charge" seems to be confined in its use only to immovable property. The term "lien" is, used in this country in places where in English law "charge" would have been more appropriate. Words like 'vendor's lien' and the like have become

too familiar to be easily discarded in favour of the more correct expression, 'vendor's charge.'

Sec. 100 of the T. P. Act draws a clear distinction between a "mortgage" and a "charge," the former being a transfer of an interest in immovable property made by the mortgagor as a security for a loan whereas the latter is not a transfer though it is nonetheless a security for the payment of debt to another.

A charge may be created (1) by act of parties, (2) by operation and not by operation of law. Every mortgage is a charge but every charge is not a mortgage. A mortgage deed must be attested by at least two witnesses whilst a charge need not be made in writing, and if reduced to writing, it need not be either attested or registered. "Charge" says Day J., "differs altogether from a mortgage. By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund, he will discharge a particular debt." *Burlinson v. Hall*, 12 Q. B. D. 347, *Kishna Lal v. Ganga Ram*, 13 All. 28, *Matiram v. Vithal*, 13 Bom. 90 F. B.

Charge how created.—(1) *By act of parties.*—A charge is generally created by a settlement or will by which the property of the settlor or testator is specially appropriated to the discharge of a portion or legacy or debt or the support of religious or charitable endowments. *Kanhia v. Muhammad*, 5 All. 11; *Chatti v. Subramma*, 7 Mad. 23; *Muhammad v. Muhammad*, 13 C. L. R. 330; *Girish v. Anundo*, 15 Cal. 66. The creation of a charge does not necessarily imply the existence of a debt. It is merely an interest carved out of the estate which may be substituted by a mortgage. *Ponlette v. Hood*, 35 Beav. 274; *Fisher* 215; *Punithavela v. Bhashyam*, 25 Mad. 406; *Go-binda v. Poresb*, 25 Bom. 161; *Imbiohi v. Achampat*, 35 M. L. J. 58. The distinction is not merely verbal as it carries with it very important consequences, because although a mortgage may be enforced against a *bona fide* purchaser for value a charge may not be so enforced, *Akhoy Kumar v. Corporation*, 42 Cal. 625; 21 C. L. J. 177.

It is worthy of notice that a charge may be created orally, although if it is created by an instrument in writing it must be registered unless made by will or the amount secured is less than one hundred rupees. *Bengal Banking Corpn. v. Mackertich*, 10 Cal. 315;

Appaswami v. Maniham, 9 Mad. 103. A charge may be created *inter vivos* by a will. When there is a non-testamentary instrument such as a deed of settlement, the law of registration must apply and the charge cannot be enforced unless the instrument is registered. Sec. 17 Registration Act. *Chalamanpa v. Subramma*, 7 Mad. 23.

(2) *By operation of law.*—These charges do not rest upon an agreement and securities created by the express or implied consent of parties. They may be divided into two clauses—"legal liens" and "judicial liens," the one constituting a part of the substantive law and the other a part of the law of procedure.

Legal liens.—(1) The earliest instance is furnished by Sec. 13 of the Bengal Reg. VIII of 1819 which allows a taluqdar of the second degree who pays the head-rent and thus saves the *putnj* from sale, a lien on the tenure.

(2) Secs. 65 and 171 of the Bengal Tenancy Act, VIII of 1885 B.C., Sec. 6 of Act, VIII of 1865 B.C., and Sec. 62 of Act VIII of 1869 B.C. Under Sec. 101 of the Oudh Rent Act, a landlord is a secured creditor of his tenant for his rent and when the tenant becomes insolvent the landlord is entitled to be paid the rent due to him out of the proceeds of the sale of the crops of the insolvent before distribution is made amongst other creditors. *Bishambernath v. Rukha*, 81 Ind. Cas. 647.

(3) Sec. 9 of Act XI of 1859, Revenue Sale Law, Act II of 1864 (Madras).

(4) Salvage Liens.

(5) Sec. 55 (4) of the T. P. Act. Unpaid vendor's lien, and Ss. 72, 73, 95 of the T. P. Act.

(6) Partner's lien.

(7) Trustee's lien under Sec. 82 of the Trusts Act, II of 1882.

(8) Lien of *cesti que trust* or charge on property purchased with trust money.

(9) Solicitor's lien.

(10) Insurer's lien.

(11) Maritime lien.

Judicial liens.—Judicial liens are liens created by the order of the Court that the payment of any money shall be secured by a charge on property, e.g., attachment of debtor's property in execution of a decree against him. Though attachment does not confer any title it cannot be said that the attaching creditor has no lien on the property attached because if he could render the decretal

amount before admission of the petition for adjudication by the debtor, he is entitled to be paid in preference to all other creditors. Vide Sec. 51 *infra*. When a Civil Court passes an order under Or. XX, r. 11 (2) C. P. C. directing that the decree against the judgment-debtor, shall be payable by monthly instalments, and that he shall give as security a mortgage on certain immoveable property, and subsequent to this order the judgment-debtor is declared insolvent, *held* (1) that the adjudication could not affect the position of the decree-holder who was entitled to obtain from the judgment-debtor the mortgage ordered prior to the adjudication. (2) That the order that the mortgage be executed was one which might be executed as if it were a decree by reason of provision of Sec. 36 C. P. C. *Allan Brothers v. Shaik Jooman*, 85 I C. 291, following *Chandra Kumar De v. Kusum Kumari Roy*, 28 C. W. N. clxxxvi, 40 C. L. J. 180: (1925) A. I. R. (C.) 57. The Indian Contract Act following the English law on the subject divides liens into 2 classes, special and general.

A special lien authorises the holder of the goods to retain them only till the particular debt in respect of the goods is paid. But a general lien extends to any balance which may be due from the owner to the holder of goods. Special liens are defined by law. Bankers, factors, wharfingers, attorneys of High Courts and Policy-brokers are alone entitled to a general lien, *Cunhan v. Bank of Madras*, 19 Mad. 234.

A particular lien may be claimed by any person who has bestowed labour on goods bailed to him either by the owner or by some person who is authorised by him to do so, but not where the bargain is made by a stranger. *Burton v. Bangham*, (1834) 6 C. & P. 674; *Keene v. Thomas*, (1905) 1 K. B. 136. An agent is entitled to a lien on the property of the principal whether moveable or immoveable in respect of his claim for commission, disbursements or services in connection with that property. Sec. 221 Indian Contract Act. *In re The Bombay Saw Mills Co., Ltd.*, 13 Bom. 314. But no lien can be claimed by a banian, *Peacock v. Baijnath*, 18 I. A. 78: 18 Cal. 573.

According to the Common Law in England a special lien arises not only in favour of a person who spends labour on another's goods but also in favour of various other persons. Common carriers, for instance, are entitled to lien, because they are obliged to receive any goods which may be committed to their custody. On the same principle a Railway Company can claim a lien for cloak-room charges.

Singer Mfg. Co. v. London & S. W. Ry. Co., (1894) 1 Q. B. 833, Sec. 55, Contract Act. Similarly, a ship-owner has a right of lien on goods carried by him. *Bristow v. Whitmore*, (1859) 4 De & J. 325. The peculiar feature of the liens is that they may be enforced against a true owner and it would seem to be almost immaterial whether the person who claims the lien did or did not know whether the goods belonged to a third person. *Robins & Co. v. Gray*, (1895) 2 Q. B. 78. But no such lien can be enforced against property in the wrongful possession of the debtor if the person who claims the lien has knowledge of such wrongful possession. *Johnson v. Hill*, (1822) 5 Stork. 172.

Hypothecation of Moveables.—The words ‘mortgage,’ or ‘charge’ is not defined in the Code of Civil Procedure. Sec. 58 and 100 T. P. Act relate to mortgage and charge respectively of immovable properties, but that Act is not exhaustive and does not profess to be a complete Code as also appears from its preamble. *Satyabadi v. Musst. Harabati*, 34 Cal. 223; 5 C. L. J. 192. *Mohd. Safiq-ul-Huq v. Krishna Gobind*, 23 C. W. N. 284; 48 I. C. 428; 28 C. L. J. 77. The Indian Contract Act no doubt speaks only of bailment of goods by way of Security; but it appears from its preamble that it deals only with a part of the law of contract applicable to British India. From these, therefore, it by no means follows that there may not be mortgage or hypothecation of movable properties. Such hypothecation or mortgage, not accompanied by possession, confers a good title upon the person in whose favour it is made and the law recognises the transaction as security and equity gives effect to it. *Sris Chandra v. Mungi Bewa*, 9 C. W. N. 14; *Damodar v. Atmaram*, 8 Bom. L. R. 344; *Haripada v. Anath De*, 22 C. W. N. 758; 44 Ind. Cas. 211; *Puninthavelu v. Bhashyam*, 25 Mad 406; 12 M. L. J. 288.

Clause (f).—Transfer of Property.—Transfer of Property means not only the transfer, assignment, conveyance of the property itself but must also include the transfer, assignment and conveyance of any rights and profits annexed to or issuing out of the same. This definition is newly added, and is on the lines of the definition of the expression in section 2 of the Presidency Towns Insolvency Act, III of 1909.

Sub-section (2).—Not defined.—Besides the words defined above, the words *decree*, *District Judge*, *judgment-debtor*, *moveable property*, *order* and others have been used in this Act but have not been defined.

They are used in the same sense in which they have been defined in s. 2 of the C. P. Code, V. of 1908.

PART I.

CONSTITUTION AND POWERS OF COURT.

3.[3] (1) The District Courts shall be the Courts having jurisdiction under this Insolvency jurisdiction. Act :—

Provided that the Local Government may, by notification in the local official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act.

(2) For the purposes of this Act, a Court of Small Causes shall be deemed to be subordinate to the District Court.

NOTES.

Review.—This chapter consists of Sections 3-5. Sec. 3 corresponds to Sec. 3 of the old Act, III of 1907. Section 4 is new and Section 5 corresponds to Section 47 of Act III of 1907.

Clause (1).—Jurisdiction.—The District Courts are the principal civil courts of original jurisdiction in any area outside the Presidency towns and Rangoon, and the judge that presides in such Courts is the District Judge. *Vide* Notes under Section 2 *ante*. It is therefore the Court of the District Judge that has jurisdiction to entertain the application for insolvency. A District Court exercising functions under the Act can interfere with execution of decrees of other courts and not otherwise, *i.e.*, unless the judgment debtor has been adjudicated insolvent or a receiver has been appointed; *Anup Kumar v. Kesho Dass*, 39 All. 547.

Proviso.—Under Sec. 3 of the Provincial Insolvency Act, the District Court is the only Court having jurisdiction to deal with the petition for insolvency in the absence of any notification of the Local Government investing subordinate Courts with jurisdiction over such class of cases. In a case in which there was no such notification, *held* that the District Judge's order transferring a petition to the Sub-

court for disposal was *ultra vires*. *Devadass Premchand v. Soleti Gopalappa*, 45 M. L. J. 689: 1923 M. W. N. 754: 18 L. W. 685: 75 I. C. 876: 1924 A. I. R. Mad. 398.

Additional District Judge.—Where there are Additional District Judges appointed under Section 8 of the Bengal, N. W. P. and Assam Civil Courts Act, XII of 1887, the Additional Judges shall discharge any of the functions of a District Judge which the District Judge may assign to them and in the discharge of their functions they shall exercise the same powers as the District Judge. In *Makhanlal v. Sreelal*, 34 All. 382: 9 A. L. J. 371: 14 Ind. Cas. 162, one of the grounds of appeal was that the Additional District Judge had no insolvency jurisdiction in as much as he was not invested by the Local Government with powers under the provisions of Section 3 (1) of the Act. Held that “under Section 3 of the Act the District Courts are Courts which have jurisdiction under the Act. The District Court means the principal civil court of original jurisdiction in the district. But Section 8 of the Civil Courts Act provides, Additional Judges appointed under Cl. 1 of the section shall discharge any of the functions of the District Judge which the District Judge may assign to them, and in the discharge of these functions they shall exercise the same powers as the District Judge. In the present case, the District Judge having assigned one of the functions to the Additional Judge, the latter has exercised the same powers as the former would have done but for his order. He has jurisdiction.” See also *Mulchand v. Murarilal*, 36 All. 8. An appeal from the decision of a Subordinate Judge with insolvency jurisdiction lies to the District Judge and not to the High Court. The mere fact that the Subordinate Judge has been invested with insolvency jurisdiction under Section 3 does not imply that he is an “Additional District Judge” within the meaning of Section 26 (1) of the C. P. Courts Act, so that appeals from his Court will lie to the High Court and not to the District Court *Madharao v. Nago*, 1923 A. I. R. (Nag). 80.

Courts subordinate to a District Court.—An Additional District Judge is not subordinate to the District Judge. *Makhanlal v. Sreelal*, 34 All. 382: 9 A. L. J. 371.

In addition to the District Court, any other Court subordinate to it may have insolvency jurisdiction provided it is specially empowered by the Local Government in that behalf by notification in the local official gazette. Under Section 3 of the C. P. Code, V of 1908, the District Court is subordinate to the High Court, and every

Civil Court of a grade, inferior to that of a District Court and every Court of Small Causes, is inferior to the High Court and the District Court. And under sections 9 and 39 of the Civil Courts Act "presiding officer of a Court subject to the administrative control of District Judge, shall be deemed to be immediately subordinate to the Courts of a District Judge, and for the purposes of the Code of Civil Procedure, the Court of such an officer shall be deemed to be of a grade inferior to that of the court of the District Judge." Under Section 18 of the same Act, XII of 1887, the jurisdiction of a District Judge or a Subordinate Judge extends to all original suits for the time being cognizable by Civil Courts and under Section 15 of the same Act the Local Government may by notification in the official gazette fix and alter the local limits of the jurisdiction of any civil court under the said Act. If the same local jurisdiction is assigned to two or more Subordinate judges, the District Judge may assign to each of them such civil business cognisable by the Subordinate Judge subject to any general or special order of the High Court.

Hence when the Court of the Subordinate Judge is invested with powers under the provision of Section 3 "within the local limits of its jurisdiction" it does not follow that he has jurisdiction only in cases arising within the local limits of *his* jurisdiction *as fixed by the District Judge* under Section 13 (2) of the said Act, but that he has concurrent jurisdiction with the District Judge in entertaining applications for insolvency. *Shankar v. Vithal*, 2 Bom. 45.

But though under the proviso to Section 3 the Court of the District Judge and that of the Subordinate Judge have concurrent jurisdiction, the proceedings having been removed from the Subordinate Judge to the District Judge, the District Judge's order is not to be considered as an original order. Orders made by the Subordinate Judge when he has seisin of the case could only be interfered with by the District Court only under the provisions of Section 46, now 75, or under the powers conferred by the Code of Civil Procedure in regard to civil suits as provided by Section 47, now 5. No appeal lies therefore against the order of the Subordinate Judge declining to take action against the insolvent under Section 43 (2) now 69; *Digendra Chandra Basak v. Ramani Mohon Goswami*, 22 C. W. N. 958; 48 Ind. Cas. 333.

Court invested.—The word "Court" is designedly used as distinguished from the word "Subordinate Judge or Munsiff" as used in Section 25 of the Civil Courts Act, XII of 1887. If a Court sub-

ordinate to a District Court is specially invested with powers under Section 3 it will have jurisdiction unless and until it is withdrawn by the Local Government and it will not require to be re-invested in the case of transfer or removal of its presiding officers, as it will require in the case of a "special" Judge or Munsiff being so invested. Thus where a Small Cause Court Judge was invested with insolvency jurisdiction and application was made to him, held, he had full jurisdiction to decide the case, *Debi Presad v. Staneeley Ray*, 6 A. L. J., 483: 2 Ind. Cas. 223. But where a Subordinate Court, not invested with jurisdiction by the Local Government by notification in the Local Official Gazette, exercised insolvency jurisdiction, held it was *ultra vires*. *Davadass Premchaed v. Soleti Gopalappa*, 45 M. L. J. 689: 1923 M. W. N. 754: 18 L. W. 685: 75 Ind. Cas. 876: 1924 A. I. R. (Mad.) 398. It should be noticed that if a subordinate Court has once been invested with insolvency powers by a notification in the Local Official Gazette under the old Act III of 1907 it is not necessary that the said Court should again be re-invested under the new Act V of 1920. Section 3 of old Act has been re-enacted word for word in the new Act V of 1920, and, therefore, under Section 24 of the General Clauses Act, 1897, the notification under the repealed Act would remain in force. *Chaturbhuj v. Harlall*. (1925) A. I. R. (Cal.) 335: 80 I. C. 858.

Appeals.—Though under Section 3 "the Local Government may invest any Court subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Court under this Act," still, however anomalous it may seem, the appeals from the decision of the Subordinate Judge having concurrent powers with the District Judge should lie to the District Judge. Section 75 (1) formerly 46 (1) clearly contemplates the exercise of insolvency jurisdiction by a subordinate court; and expressly provides that appeals against such orders shall lie to the District Court. This state of things is not uncommon, as for instance, it may be pointed out that appeals against the decisions of subordinate judges in suits below Rs. 5,000 lie to the District Judge although in respect of such suits they have concurrent jurisdiction. *Niothan Mullick v. Ramani Mohan*, 63 Ind. Cas. 846.

Commissioner in Insolvency.—Section 18 of the Presidency Towns Insolvency Act, 1909, does not confer power on the Commissioner in Insolvency to stay insolvency proceedings pending against the insolvent

in any other Court. The other insolvency is neither a 'suit' nor 'other proceeding' pending against the insolvent within the meaning of the section. The "other proceedings" should be *ejus dem generis* with or analogous to a suit. The District Court in its insolvency jurisdiction is subject to the 'superintendence' of the High Court on its Appellate side, and not to the Commissioner in Insolvency. *In Re. Manickchand Virchand*, 47 Bom. 275.

4. [New.] (1) *Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.*

(2) *Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.*

(3) *Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1), but has reason to believe that the debtor has a saleable interest in any property, the Court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.*

NOTES.

Review.—This section is new. The introduction of this section is thus explained in the Statement of Objects and Reasons: "A further defect in the Act is the absence of provisions sufficiently defining the power of Courts to decide questions of law and fact

arising in insolvency proceedings. This question has been recently the subject of conflicting decisions and it is desirable that this conflict between the High Courts should be terminated, and having regard to the prevalence of *benami* transactions in India and the importance of arming courts with adequate powers for the speedy realisation of assets in the interests of creditors, the Government of India are of opinion that the Courts should be given full power to decide all questions raised in insolvency proceedings. That is to say, the effect of a decision of the Insolvency Court on any question of this sort should be *res judicata*." There is no section in the old Provincial Insolvency Act, III of 1907, corresponding to Sec. 4 of the present Act. There were conflicting decisions in regard to the power of the Court to deal with the claims of third parties against the insolvent and it was to set at rest the doubts that existed upon the subject that Section 4 was introduced into the present Act. It will be seen that very wide powers are given to the Court under Sec. 4; the Court may decide any question which it may deem it expedient or necessary to decide for the purpose of doing complete justice or making complete distribution of property. *Ramaswami Chettiar v. Ramaswami Aiyangar*, 42 M. L. J. 185: 1922 M. W. N. 110.

By the enactment of the present section the jurisdiction of the Insolvency Court has been considerably increased, and, in fact, it is now co-extensive with the Civil Court. It is no longer confined to consider only those cases of "voluntary transfers" and "fraudulent preferences" as are referred to in Sec. 36 and 37 (now Section 53 and 54) but "all questions of title and priority of any nature whatsoever" have been brought within its cognisance. Section 16 (5) of the old Act which is Section 28 (6) of the present Act provides that "nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." Therefore Section 28 (6) leaves the secured creditor quite independent of the insolvency proceedings and free to choose his own remedy in realising or otherwise dealing with his security. Under the present section, however, it is quite within the competence of the Insolvency Court to question the validity or otherwise of the security of the secured creditor and the order of the Insolvency Court regarding the validity of his security shall be binding on him and shall be final and *res judicata*. The decision of the Insolvency Court against an objector claiming a property attached by the Receiver in

insolvency is conclusive and no suit will lie as it is precluded by Section 4. *Barra Begum v. Babu Sheo Narain*, 1923 A. I. R. 293 (All), though in *Harman v. Ganpat* 73 Ind. Cas. 367 (Lahore) a different view has been taken. The secured creditor's freedom of choice under Section 28 (6) therefore seems to have been affected by the present section. *Moti Ram v. Rodwell*, 2 A. L. J. 32: (1923) A. I. R. (A.) 159.

A Court exercising insolvency jurisdiction under Act V. of 1920 has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by the special provisions of general law, including such questions as are raised by Section 53 of the Transfer of Property Act. *Shikri Prasad v. Aziz Ali*, 44 All 710: 19 A. L. J. 862: 63 Ind. Cas. 601.

Conflicting Decisions.—In *Hukumat Rai v. Padam Narain*, 39 All 353 it was held that the decision of an Insolvency Court as between rival claimants to property attached by the Receiver does not operate as *res judicata* in respect of a suit on title by one claimant against the other for the recovery of such property. In *Irshad Hussain v. Gopi Nath*, 17 A. L. J. 374: 49 Ind. Cas. 590 it was held that a suit is barred by reason of the previous order of the Insolvency Court. In *Khussali Ram v. Bholarmal*, 37 All 252, it was laid down that it was open to any creditor to challenge the validity of a debt set up by any other creditor, and if he does so, the Judge is bound to enquire into the truth of his allegation, and cannot refer the applicant to his remedy by suit. In *Bansidhar v. Kharagjit*, 37 All 65, it was held that a Court exercising powers under the Provincial Insolvency Act has jurisdiction to enquire whether property in possession of a third party and alleged by the Receiver to be the property of the insolvent is really so or not. In *Narasingha v. Virasghavahi*, 41 Mad. 440, certain property alleged to belong to the insolvent was sold by the Receiver, the purchaser was resisted in taking possession by a third party as holding the same in his own right. The District Judge held an enquiry and ordered delivery of possession to the purchaser. It was held that the District Judge had no jurisdiction to pass such an order. In *the matter of Umbica Nundun Biswas*, 3 Cal. 434, it was held that the matter could not be properly dealt with in the Insolvency Court "as it involved difficult questions of title." In *Satya Kinkar Mukherji v. Manager, Benares Bank, Ltd.*, 22 C. W. N., 700 it was held that if the question of title be seriously in dispute the Judge should direct the Receiver to bring a suit to have the question determined. In *Joy Chandra Das v. Muhammad Amir*, 22 C. W. N.

702, it was held that "the proper procedure was for the creditor to apply to the Court to direct the Receiver to institute and continue a suit against the wife of the insolvent to recover the property in question and the Court should make such an order if in its opinion the creditor has *prima facie* case." In *Nilmoni Choudhury v. Durgacharan Chaudhuri*, 22 C. W. N. 704, it was held that the Court may direct an administrative enquiry by the Receiver for the purposes of informing his mind and deciding as to what action should be taken, and if in the result he is of opinion that a suit should be brought, he should make the order.

Jurisdiction.—This new section now sets at rest the above conflicting decisions and lays down authoritatively that the Insolvency Court is quite competent to try all questions of title and priority, and all questions of law and fact that arise in the proceedings either between the insolvent and the creditors, or amongst the creditors themselves. Such decision shall henceforth be binding as between the parties between whom the question is raised, and will operate as *res judicata*, *Sitaram v. Beni Prasad*, 84 I. C. 790.

But a judgment declining to adjudicate upon a matter will not operate as *res judicata*, *Gaura v. Nawab Mohammad* 64 Ind. Cas. 523. Section 4 of Act V of 1920 has now given Courts full power to decide the merits of the claims of third parties and in future the plea that the Insolvency Court has no jurisdiction to investigate the alleged title of a third person would be obviously untenable, *Gangadhar v. Sridhar*, 61 Ind. Cas. 489. Sections 36 & 37 of the old Act, III of 1907, (now Sections 53 & 54) are only rules of evidence or special rules of substantive law applicable to particular kinds of transfer by the insolvent, and apart from the provisions of these sections the Court had power to enquire into the real existence of an alleged secured debt in favour of a particular scheduled creditor of the insolvent. The preponderance of authority was in favour of holding that under Act III of 1907 the Court in the exercise of its insolvency jurisdiction could not decide questions relating to adverse claims by or against third parties. The law enunciated in Sections 36 & 37 was not a part of the general law and was to be applied only in cases which came before the tribunal exercising powers conferred by the Insolvency Act. A comparison of the terms of Section 53 of the T. P. Act with the terms of Sections 36 & 37 of Act III of 1907 will make the point clear. A settlement made by a person whose solvency is beyond question but who, owing to unforeseen circumstances, becomes

an insolvent within two years of the date of the settlement, cannot be set aside under the general law which is contained in Section 53 of the T. P. Act. But it can be annulled under Section 36 (53) of Act III of 1907. Sections 36 and 37 enact rules of substantive law for Insolvency Courts. Sections 36 & 37, now 54 & 54, do not deal with the jurisdiction of the Insolvency Courts and the jurisdiction which the Court possesses under other sections of the Act is not affected by anything contained in these sections. *Dronadula v. Ponakavira*, 45 M. L. J. 105: 1923 M. W. N. 306: 72 Ind. Cas. 805: 1923 A. I. R. (Mad). 641. "Section 4 of the Provincial Insolvency Act, 1920, does not for the first time confer a new power on the Insolvency Court. It is only declaratory of the pre-existing law. By the enactment of Section 4 the Insolvency Court is not merely confined to consideration of any transaction within two years as provided in Section 53 but to any transaction whether before or within two years from the date of adjudication which has the effect of putting the property *benami* and not available to creditors." *Kochu Mahomed Tharagon v. Sankaralinga Mudalier*, 40 M. L. J. 219: 1921 M. W. N. 236: 14 L. W. 508: 62 Ind. Cas. 495.

Exclusive Jurisdiction.—Section 4 does not confer exclusive jurisdiction on the Insolvency Court and it cannot be said that the only remedy open to an aggrieved stranger is to apply to that Court. Where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of that Court which can be pointed as amounting to a decision within the meaning of Sub. Cl. (2) of Sec. 4, he is at perfect liberty to have recourse to the ordinary Civil Courts. Section 68 provides a speedy remedy to which a recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him. If a person applies under Section 68, he is subject to the time limit prescribed therein, but if he wants to enforce his claim in the Civil Courts in the ordinary way, his rights would be those of an ordinary person. It is open to a third person whose property has been taken possession of by the Receiver, and who does not claim title through the insolvent, to treat the Receiver as a trespasser and maintain his claim in a Civil Court. There is no provision in the Provincial Insolvency Act, other than that contained in Section 4, which in any way takes away the jurisdiction of a Civil Court to try such a suit. Under Section 4, if a question of title is actually raised by a Court of Insolvency and decided by the Insolvency Court the decision is final and the question cannot be re-opened in a

Civil Court by a regular suit. *Maharana Kunwar v. E. V. David*, 77 I. C. 57: (1924) A. I. R. (All), 40: 21 A. L. J. 737.

Discretionary Jurisdiction.—Section 4 is wide enough to enable an Insolvency Court to adjudicate upon questions of title “which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any case” of insolvency. But the power given by the Section is subject to the provisions of the Act, one of which is the proviso to Section 56 (3) which is in the way of a Court removing any person from the possession of property whom the insolvent has not a present right to remove. Where, therefore, the Insolvency Court, even if it adjudicated upon the title of the insolvent as against the third party, would have no power to recover the property free of obstruction, it would be mere waste of time to adjudicate upon questions of title, and, therefore, it would certainly be expedient to have these questions decided in a regular suit. Section 4 reserves the powers to Insolvency Courts to decline to decide questions which it does not deem it necessary or expedient to decide in those proceedings. *The Official Receiver, South Arcot v. Perumal Pillai*, 79 I. C. 322: 1924 A. I. R. (Mad.) 387. Under the provisions of the Act though the Insolvency Courts have full power to decide all questions whether of title or priority Sub-clause III leaves it entirely to the discretion of the Courts to decide any question of title or priority. *Whether the Court should or should not exercise the jurisdiction depends upon the question as to whether the decision would settle once for all the dispute or some other proceedings would have to be taken for final decision of the matter.*

Where the Court ought to exercise jurisdiction.—In England where the trustee in bankruptcy or Receiver has a *higher and better* title than the bankrupt or insolvent, for example, where a transaction is impeached as a fraudulent preference, or an act of bankruptcy or insolvency, the Insolvency Court ought to exercise jurisdiction. *Ex parte Brown*, 11 Ch. D. 148. And the Court may exercise jurisdiction in a proper case. *Ex parte Armitage*, 17 Ch. D. 13. Ordinarily an insolvency Court ought not to refer parties to a Civil Court for the determination of the question as it has sufficient jurisdiction to decide all questions of title under Sec. 4. *Surja v. Girindra*, 79 Ind. Cas. 552.

Where the Court ought not to exercise jurisdiction.—But where such trustee or Receiver claims only, the same right as the insolvent would have had the Insolvency Court ought not, as a rule, to exercise jurisdiction. *Ex parte Dickin*, 8 Ch. D. 377. If for instance, property

seized by a Receiver as that of the insolvent is claimed by a third person as his, the Receiver stands in the shoes of the insolvent and the third person has a right to sue in a Civil Court for the establishment of his right without resorting to the remedy provided in Sec. 68. *Nagindas Chunilal v. Official Assignee Bombay*, 35 Bom. 473. The Official Assignee or the Receiver merely steps into the shoes of the insolvent for the purposes of his rights and liabilities. He is merely the legal representative of the debtor with such right as he would have had if not bankrupt. In *Re. Mapleblack, Ex parte Butt*, 4 Ch. D. 150. The Court will not exercise jurisdiction to decide personal claims or claims to property as between third persons, although the result of such decision might be to determine which of such persons should prove against the insolvent's estate. *Ex parte Smith*, 2 Ch. D. 51, *Re. Lowenthal*, 13 Q. B. D. 233. In *Hukumat Rai v. Padam Narain*, 39 All 353, it has been held that where two persons claim a property seized by the Receiver and the Judge awards it to one of them, the other may maintain a Civil suit against the successful person, and in *Misri Lal v. Kanhya Lal*, 66 Ind. Cas. 863, a person whose property was seized by the Receiver as that of an insolvent, it has been held, could appeal either to the Insolvency Court or bring a separate suit to declare his title, and if he elects to have the dispute settled by the Insolvency Court, the decision of the Insolvency Court would be *res-judicata*. It follows, therefore, that where the Insolvency Court, even if it adjudicated upon the title of the insolvent as against third parties, would have no power to recover the property free of obstruction, it would be more waste of time to adjudicate upon questions of title, and, therefore it would certainly be expedient to have these questions decided in a regular suit; and Sec. 4 reserves the power to Insolvency Courts to decline to exercise jurisdiction in deciding questions which it does not deem it necessary or expedient to decide in those proceedings. *The official Receiver v. Perumal Pillai*, 79 I. C. 322: 1924 A. I. R. (Mad.) 387.

Secondly, where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict of jurisdiction. *Sridhar Chowdhury v. Mugni Ram Bangar*, (1924) I. L. R. 3 Patna, 357: 78 Ind. Cas. 620.

Jurisdiction to set aside the summary decision of a Civil Court.—Under Or. XXI r. 58. C. P. C. where any claim is preferred to, or any objection is made to the attachment of, any property in execu-

tion of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection, and under Or. XXI. r. 63 C. P. C. the party against whom an order is made by the executing Court after the investigation of the claim may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. In *Seth Sheolal v. Giridhari Lal*, 1924 A. I. R. (Nag.) 361, it was contended that as the objection of a stranger to the attachment of the property in execution of a decree by a decree-holder against the judgment-debtor who was subsequently declared insolvent was upheld, the order under Or. XXI. r. 63 C. P. C. was conclusive until it was set aside by a suit, and that not having been done, it was conclusive as against the attaching decree-holder, and it could not be asked in insolvency proceeding that the transfer by the insolvent was fraudulent. Baker, J. C., observed "as a matter of fact, a suit was brought by the decree-holder and has been decided not on the merits but on the ground that no such suit would lie when once the debtor has been declared insolvent, as under Sec. 28 of the Act no such suit could be brought without the leave of the Insolvency Court. But the application under Sec. 53 of the Act may be considered as a suit to establish the right which the creditor claims, and it would be wholly inequitable to dismiss the suit on the ground that the property was vested in an Insolvency Court and to prevent him from raising his plea in the Insolvency Court. The matter is not *res judicata*."

Law and Procedure.—Under the Provincial Insolvency Act the property of the insolvent vests in the Receiver. The provision of Sec. 4 of the Act cannot, therefore, be taken to authorise a creditor to prosecute an enquiry in regard to a conveyance executed by the insolvent shortly before his adjudication. *Ram Sundar Ram v. Ram Charit Bhakat*, 79 Ind. Cas. 726: an Insolvency Court has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by the special provisions of the Insolvency Act, where, for example, a trustee is given a higher title than the original debtor. But the Insolvency Court also has to apply and to decide all questions of general law including such questions as are raised by Section 53 of the T. P. Act. In a case where it is alleged that the insolvent has sold his property before his insolvency merely with the intent to defraud and delay his creditors, there ought to be full enquiry between the Receiver and the creditors on the one hand and the debtor and his family on the other as to the *bonafides* of

the transaction and, in the main, the provisions of the C. P. C. are applicable to such enquiry, and there ought to be sworn testimony and the same care used with regard to documents and the admission and rejection of documentary evidence as in a suit. A decision in a question whether an insolvent 3 years before the insolvency sold his property merely with intent to defraud and delay his creditors, is a decision on a question of title within the meaning of Section 4 of the Provincial Insolvency Act and is appealable under Section 75 (2) of the Act. *Shikri Prasad v. Aziz Ali*, 19 A. L. J. 862: 63 Ind. Cas. 601: 44 All 71. Where a matter has to be decided on trial, the Court should hold the trial itself and retain the advantage of seeing the witnesses give evidence following the course of the proceedings. It should not delegate its duty to a person whose interest duty may conflict in the conduct of the proceedings. *Krishna Iyer v. Official Receiver, Trinchinopoly*, (1925) A. I. R. (M.) 381.

Onus.—Certain property was attached as being the property of the insolvent by the Receiver. Thereupon the insolvent's wife filed an objection claiming the property to be hers. She produced some evidence to prove her title, and no rebutting evidence was adduced by the Receiver. The Court considered the evidence to be vague and inconsistent and dismissed her claim. Held, on appeal, that the onus lay on the Receiver to show that the property was the property of the insolvent and as he had adduced no evidence in contradiction of the claim the Court had no alternative but to give effect to it. Such a claim differs from an ordinary suit by an alleged owner against somebody in possession and the maxim that the plaintiff must succeed on the strength of his own title and not on the weakness of his adversaries is not applicable to such claims, *Khazano v. Bunnarilal*, 19 A. L. J. 497.

Sub-section (2).—Sub-section (2) refers in terms to the claims between the debtor and the debtor's estate and all claims against him and it on the other hand. It is also to be noted that a discretion is given to the Court to decide the question in insolvency proceedings and that it is not binding upon the Insolvency Court to decide under this section every claim which is brought up before it. *Ramaswami Chettiar v. Ramaswami Aiyangar*, 42 M. L. J. 185: 1922 M. W. N. 110: 45 Mad. 434.

Under Section 41 of the Evidence Act, I of 1872, "a final judgment, order or decree of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon

or takes away from any person a legal character or which declares any person to be entitled to any such character or to be entitled to any any such person to any such thing is relevant. It is a judgment *in rem*." Under this section of the Evidence Act, the judgment, order or decree of an Insolvency Court shall be conclusive proofs of the matters decided therein. The enactment of Sub-section (2) does away with the questions of competency or jurisdiction of the Insolvency Courts, and every question of title or priority, or of fact or law, decided by the Insolvency Court must be held within its jurisdiction under sub-section (1), and other judgments or orders made must be held to be conclusive and binding for all purposes, and the Civil Courts have no jurisdiction to question the validity or the finality of such judgments, orders or decrees. A decision under this section shall be deemed to be a decree, binding on the parties, *Sita Ram v. Beni Prasad* 84 I. C. 739. Section 78 *infra*.

Sub-section (3).—Though the Court has power under Sub-section (1) to decide a question of title it has full discretion to follow the course laid down in sub-section (3), *i.e.*, to refuse to decide questions of title and to direct sale of insolvents' right, title and interest, whatever that might be. Where the Court has reason to believe that the debtor has a saleable interest in any property, it may, without further enquiry, sell such interest. *Jitendra Nath v. Fateh Singh Nahar*, 26 C. W. N. 921: 7 Ind. Cas. 320.

Limitation to Jurisdiction.—Though it was intended to provide the Insolvency Courts with extensive powers to decide all questions of title or priority, fact or law still they have not and they are not intended to have the jurisdiction of realising debts due to the insolvent. In *Gobinda v. Gopal*, 9 N. L. R., 182, it was held that "the Court in the exercise of its insolvency jurisdiction has no summary power of realising debts due to the insolvent. The powers of the Court for this purpose are the same as those of the Receiver (section 23 now section 58). And the powers of the Receiver are defined in Section 20, now Section 59. The power to order an alleged debtor of the insolvent to deposit the amount of the debt in Court or pay up is not one of those powers. The Court has no power to enquire and judicially determine the existence or the amount of the debt. It is in this respect meetly managing the estate of the insolvent. It has power to enquire into claims against the estate, and not into claims by the estate." See also *Wanzari v. Amrita*, 44 Ind. Cas. 537.

Receiver's Power under Sec. 4.—An Official Receiver in insolvency has no power to make any order on a claim petition filed before him, as it is not a power, which has been delegated to him under Sec. 80 of the Act. If the claimant wants to prevent the sale by the Official Receiver of some property as belonging to the insolvent he should apply to the District Judge *direct* to take action under Sec. 4 of the Act. *Villayappa Chettiar v. Ramanabiram Chettiar*, 47 M. 446: 78 I. C. 1017: 46 M. L. J. 806: (1924) M. W. N. 163: 19 L. W. 251: (1924) A. I. R. (M) 529.

Appeal.—When a question is decided under Sec. 4 which is in very wide terms, not only an appeal lies under Sch. I. Sec. 75 (2) but a second appeal would also lie under Sec. 75 only on a point of law as provided in Sub-section (1) of Sec. 100 C. P. Code. *Seth Sheolal v. Girdharilal*, 1924 A. I. R. (Nag.) 361.

5 [47] (1) Subject to the provisions of this Act the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits.

NOTES.

Review.—This section corresponds to section 47 of III 1907 and should be read with Section 75 corresponding to Section 46 of Act III of 1907.

Court's Powers.—Section 5 makes provision *inter alia* for effect being given to the orders and decrees passed by the Insolvency Court. A question arose as to whether a purchaser from the Receiver has the right to apply to the Court for being put in possession of the property purchased by him. The District Judge disallowed the application on the ground that the Court cannot issue a delivery warrant on the application of a stranger to the proceedings. Held, that the execution of any order made by the Court under Section 56, now Section 4, will be regulated by the terms of Section 5. For instance, if an

order for a warrant of possession is made in favour of the Receiver or of a purchaser from him the method of executing the warrant under Section 5 will be the same as that prescribed for the execution of a warrant issued by the Court in the exercise of original civil jurisdiction. The Legislature having invested the Insolvency Court with extensive powers under Section 4 it would be anomalous to hold that the Courts are powerless to give effect to their judgments. The terms of Sections 4, 5 and 56 do not suggest that any such limitation is intended. The auction-purchaser can therefore under the provisions of the Insolvency Act of 1920 apply to the Insolvency Court for a warrant of possession, *Ramaswami Chettiar v. Ramaswami Aiyangar*, 42 M. L. J. 185: 45 Mad. 434. An order passed by the Court is, under Sec. 36 C. P. C. capable of execution as a decree *Chandra Kumar v. Kysum Kumari*, 40 C. L. J. 180: 28 C. W. N. 187 (notes): 1925 A. I. R. (Cal.) 57 followed in *Allen Brothers v. Sheik Jooman*, 1925 A. I. R. (Ran.) 189. Under the provisions of Section 5 (1) the Court has power to bring on the record of the insolvency proceedings the names of the legal representatives of the deceased insolvent, *Ramjas v. Katha Singh*, 9 P. L. R. 192. 14 P. W. R. 1921: 59 Ind. Cas. 51. Under Section 5 the District Judge is quite competent to alter his own order in review after it had been passed. *Official Receiver, Tanjore v. Nataraja Sastrigul*, 46 Mad. 405: 72 Ind. Cas. 225: 1923 A. I. R. (Mad.) 355.

C. P. Code.—The Insolvency Courts are by Section 4 invested with very extensive powers and are, in fact, in no way inferior to Civil Courts. How then should the enquiries be held by the Insolvency Courts in order that the judgments, orders and decrees may have the effects they are intended to have under section 4 (2)? In *Bansidhar v. Kharagjit*, 37 All 65 the Insolvency Court held an enquiry under section 47 of Act III of 1907 and found that a particular property was the property of the insolvent and ordered its delivery to the Receiver. The High Court held that in making such enquiry the Court should follow the procedure of a Civil Court in a civil suit, should require the Receiver and the parties in possession to state their case in writing, should fix issues and should give the parties an opportunity of producing evidence. And where a matter has to be decided on trial the Court should hold the trial *itself*. It should not delegate its duty to a Receiver or to any other Court subordinate to it. *Krishna Iyer v. Official Receiver, Trinchinopoly*, 1925 A. I. R. (M.) 381.

Dismissal for Abuse of Process.—In England, both under the Bankruptcy Act of 1869 and 1883, an insolvency petition whether presented by a debtor or creditor may be dismissed if it has been presented not with the *bona-fide* intention of obtaining an adjudication but for an inequitable or collateral purpose, *e.g.*, for the purpose of extorting money from the debtor or to put unfair pressure upon him or where the action amounts to an abuse of the process of the Court. In England this power to dismiss such petitions is regarded as inherent in the Court. Indian Courts have similar authorities under Section 47 of Act III read with Section 151 C. P. C. *e.g.*, *Girwadhuri v. Joy Narain*, 32 All 645, *Samiruddin v. Kadumoyee*, 15 C. W. N. 244: 12 C. L. J. 445, *Draupdi v. Hiralal*, 34 All 496: 10 A. L. J. 3, *Hasmat Bibi v. Bhagwan Das*, 36 All. 65.

Substitution.—Where on the death of an insolvent after the order of adjudication the proceedings in insolvency are directed to be continued under old Section 10, new Section 17, of the Provincial Insolvency Act at the instance of the representatives of the deceased insolvent, on general principles as well as on the express provisions contained in old Sec. 24 (3), now Section 33 (3), read with the further provision contained in old Section 47, now Section 5 of the Act, "it is incumbent upon the Court to permit the representatives of the insolvent to be present so as to give them an opportunity of cross-examining the claimants-creditors and their witnesses and to offer rebutting evidence in support of their plea that their claims have either been satisfied or are barred," *Sripat Singh v. Maharajah Sir Prodyat Kumar Tagore*, 57 Ind. Cas. 810.

Inherent Jurisdiction.—In *Abdul Rajah v. Basiruddin*, 14 C. W. N. 586: 11 C. L. J. 435, the question arose as to whether the High Court can make any order of *ad interim* protection and appointment of an *ad interim* Receiver. Held that Section 47 provides that subject to the provisions of the Act "the Court in regard to proceedings under the Act shall have the same powers and shall follow the same procedure it has and follows in the exercise of original civil jurisdiction. As the term "Court" is defined in the Act to mean the Court exercising jurisdiction under the Act, this makes ample provision for the Court of the first instance to order *ad interim* protection. The second subsection of Section 47 then provides that subject to, as aforesaid, High Courts and District Courts shall have the same powers and shall follow

the same procedure as they respectively have and follow in civil suits—this provision authorises the High Court as a Court of Appeal to exercise all the powers which it may exercise in the case of a civil suit pending in appeal before it. The provision read with Section 151 C. P. C., V of 1908 does adequately meet the case.” This view of the Calcutta High Court was not, however, accepted by the other High Courts as a correct proposition of law. Hence there was a considerable difference of opinion as to whether an Insolvency Court has jurisdiction to grant an *ad interim* order of protection *before* adjudication. Though the above view had been expressly and impliedly dissented from in many cases, the principle of it has been accepted as correct by the Madras High Court in *Nanallagati Goundan v. Ramana Goundan*, 47 M. L. J. 783: 1925 A. I. R. (Mad.) 170, in which the appellant who had filed an application for adjudication as an insolvent applied for *interim* protection, and his application was rejected by the District Judge. There was an appeal against the order of the District Judge, and in appeal the High Court held, following *Abdul Rajah v. Basiruddin*, 14 C. W. N. 586, that the District Judge *has inherent* powers under Section 5 to grant the appellant the protection he claimed.

Section 148 C. P. Code.—Jurisdiction to extend time.—There is considerable divergence of judicial opinion as to whether the Insolvency Court has jurisdiction to extend the time prescribed in Section 43 of the Insolvency Act. In *Ex parte Ramkrishna Misra*, 1. L. R. 4 Patna 51, the Patna High Court held that the provisions of Section 43 are mandatory, there being no discretion in the Court to enlarge the time after the expiry of the period fixed by the Court for an application for an order of discharge. The word “shall” in Section 41 of the Act imposes a duty upon the insolvent the breach of which involves the consequences pointed out in Section 43. Waller, J., in *Arungiri Mudaliar v. Kandaswami Mudaliar*, 83 Ind. Cas. 955 concurred with the view of the Patna High Court in the following terms. “Section 43 is absolutely peremptory in its terms and I am of opinion that directly the Court was informed of the insolvent’s omission to apply within the time fixed, the only course open to it was to annul the adjudication. That being so, it follows that no application for extension of the period can lie after it has expired. No doubt Section 148 of the C. P. Code allows extension of this description; but the Code is applicable only so far as as it does not conflict with the provisions of the Provincial Insolvency Act, and they are opposed to such an

extension." Justice Krishnan, on the other hand, in the same case held, following *Badri Narain v. Sheo Koar*, 17 Cal. 512: 17 I. A. 1. (P. C.), and *Bhagwandus Bagla v. Haji Abu Ahmed*, 16 Bom. 263, that there is nothing in the Insolvency Act to prevent the District Court from extending the time after the period fixed originally had expired under Section 43. "That being my view, it seems to me, that Section 148, C. P. Code, which now expressly enacts that time may be extended, even after the expiry of the original period fixed, can be applied to these proceedings by virtue of Section 5 (1) of the Insolvency Act."

Objection as to Jurisdiction.—Section 47 (1) "does not directly or by implication make Section 21 of the C. P. Code, 1908, applicable to proceedings under the Provincial Insolvency Act and consequently the doctrine that no objection as to the place of suing shall be allowed by an Appellate Court unless such objection was taken in the Court of first instance at the earliest possible opportunity could not be applied to provisions under the Insolvency Act, *Madho Pershad v. Walton*, 18 C. W. N. 1050. This authority has been superseded by the proviso to Section 11 of the present Act.

The dismissal of an application for restoration of an application for adjudication in insolvency dismissed under Order IX r. 2 C. P. Code is no bar to the presentation of a fresh petition for insolvency. Order IX r. 4 C. P. Code does not say that if an applicant avails himself of the second alternative mentioned in the rule he is precluded from instituting a fresh application; *Abdul Aziz v. Habid Mistry*, 49 Ind. Cas. 229.

High Court.—In an appeal from a sentence of imprisonment under old Section 43, now Section 69, the High Court has power under Or. XLI, r. 5 of the C. P. C., read with clause 2 of the present section to suspend the sentence until the appeal is disposed of, *Nagindas Bhukhandas v. Ghelabhai Gulabdas*, 56 Ind. Cas. 449. The powers given to the Insolvency Court by Section 5 (2) of Act of 1920 are subject to the provisions of that Act, but there is no provision which states that an interlocutory order is final. The High Court has power to set aside an interlocutory order passed in a Civil Suit; it has therefore power to set aside an interlocutory order passed in an insolvency proceeding. *Gangadhar v. Sridhar*, 61 Ind. Cas. 589.

Privy Council.—In *Chatrapati Singh Dugar v. Kharag Singh Luchminarain* 40 Cal. 685: 17 C. W. N. 752, it was argued that Sections 46 and 47 of Act III of 1907 if anything, negated the right of

appeal. Jenkins C. J. held "I do not so read the Insolvency Act. In my opinion, by that Act, there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist.'

PART II.

PROCEEDINGS FROM ACTS OF INSOLVENCY TO DISCHARGE.

Analysis.—This is the most important portion of the Provincial Insolvency Act, V of 1920. It consists of Section 6-44, and it deals (1) with Acts of Insolvency, Section 6, (2) with petition for insolvency, their contents and verification, procedure on their admission, interim proceedings, duties of debtor and their releases, Sections 7-23, (3) with procedure at hearing, Sections 24-26, order of adjudication and effect of the order, Section 27-30, (4) with proceedings subsequent to order of adjudications Section 31, power to arrest after adjudication Section 32, framing of the schedule, Section 33, debt provable under the Act, Section 34, (5) with the annulment of adjudication and its proceedings, Section 35-37, (6) with composition and schemes of arrangement, section 38-40, (7) with discharge, failure to apply for discharge, and effect of discharge, Section 41-44.

Acts of Insolvency.

6. [4] A debtor commits an act of insolvency in each of the following cases, namely :—
Acts of Insolvency.

- (a) if, in British India or elsewhere, he makes a transfer of *all or substantially all* his property to a third person for the benefit of his creditors generally :
- (b) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors ;

- (c) if, in British India or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;
- (d) if, with intent to defeat or delay his creditors,—
- (i) he departs or remains out of British India,
 - (ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him;
- (e) if any of his property has been sold in execution of the decree of any Court for the payment of money;
- (f) if he petitions to be adjudged an insolvent under the provisions of this Act;
- (g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts; or
- (h) if he is imprisoned in execution of the decree of any Court for the payment of money.

Explanation.—For the purposes of this section the act of an agent may be the act of the principal.

Review.—This section is substantially the same as Section 4 of Act III of 1907.

The questions that naturally arise are; Who is insolvent, and when can he be declared insolvent under the Act: what is meant by

insolvency, and what are the acts of insolvency? Solvency means ability to pay just debts. Insolvency means inability to pay or settle just debts. This insolvency or inability to pay or settle one's just debts may arise from various reasons over which a debtor has no control *e.g.*, loss in his trade on account of fall in prices, want of circumspection or foresight, natural calamities, such as fire, robbery, etc., or it may be due to the fraudulent intention of the debtor, *viz.*, to defeat or delay his creditors. An honest debtor when he finds his position insecure, places his properties, if any, at the disposal of a creditor or a trustee for distribution amongst his creditors, or does some other thing for the payment of the dues of his creditors. A dishonest debtor makes a transfer of his property with or without consideration and either misappropriates the sale proceeds or keeps the property *benami*. What a man does when he could not or would not pay debts are called his *acts of insolvency*, and Section 6 enumerates some of the acts which constitute "acts of insolvency." And on the commission of any of those acts, the debtor or the creditor as the case may be has a right to present an application to the Court for an order of adjudication and protection.

Classification.— The acts of insolvency enumerated in this section are not exhaustive. Acts of Insolvency or Bankruptcy can be divided into 3 classes: (1) those which arise from dealings by the debtor with his property Section 6 (a); (2) those which consist of personal acts or defaults by the debtor, Section 6 (b), (c), (d), and (3) those which arise from the condition of his affairs showing him to be insolvent, Section 6 (e), (f), (g) and (h). The acts of insolvency enumerated in Section are taken from the English Bankruptcy Act, 1883, Section 4. Disposition of property referred to in Section 6 (a) was before being made an act of bankruptcy by statute, always regarded by the courts as an act of bankruptcy, because these were dispositions which deprived the debtor's creditors the benefit of the bankruptcy laws. *Bauker v. Burdekin* 1843, 11 M. & W. 128: *Stuart v. Moody* 1835, Cr., M. & R. 777.

Clause (a).—In *Khoo Kwat Siew v. Wooi Taik Hwat*, 9 Cal. 224 (P. C.) it was held that "the well-known rule of law was, if a trader assigns all his property except on some substantial contemporaneous payment or some substantial undertaking to make payments *in future*, that is an act of insolvency, and is void against the creditors." In the matter of *Amborse Summers*, 23 Cal. 592, it was held that an assign-

ment of the stock-in-trade by a letter of hypothecation amounted to an act of bankruptcy, and created no equity available as against the Official Assignee.

"In British India or elsewhere."—A debtor commits an act of insolvency by transferring his property whether in British India or elsewhere. This is in accordance with the principles laid down in *Cook v. Charles A. Vogelar*, 1901 App. Cas. 102: *Ex parte Crispin*, 1873 3 Ch. App. 374.

Intention.—Proof of an intention to defeat or delay his creditors was never required to establish this act of bankruptcy because the necessary effect of the conveyance or assignment is to defeat or delay his creditors and to prevent his property from being administered in the manner contemplated by the provisions of the Bankruptcy Acts. *Re. Wood* 1872, 7 Ch. App. 302; *Dutton v. Morrison*, 1810, 7 Ves., 194; *Ponsford v. Walton* 1868 L. R. 3 C. P., 167 *Ex parte Wenley* 1862 1 De. G. J. & S., 273. In the last case the principal part of the property was assigned, and it was assumed that this would be sufficient to satisfy the words of the section "his property."

Clause (b).—This is Section 4 (1) of the Bankruptcy Act, 1883. The same principles as to the place where the property exists and the conveyance is made apply in the case of an assignment for the benefit of creditors, *Cook v. Charles A. Vogelar*, *supra*. A debtor commits an act of insolvency if in England or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof. A transfer of property with intent to delay or defeat creditors is an act of bankruptcy. A notice suspending payment of debt by one partner is not an act of insolvency of the firm, *Debendra Sikdar v. Pursotam Das*, 55 Ind. Cas. 186.

Classes of fraudulent transfers.—For the purposes of insolvency there are broadly speaking two classes of fraudulent assignments: (1) assignments under Section 53 of the T. P. Act and (2) assignments fraudulent under the Insolvency Act. Any assignment which would be fraudulent under Section 53 of the T. P. Act is an act of insolvency under the Insolvency Act for to render an assignment void under the T. P. Act it is necessary to prove or infer an actual intention to defraud creditors, whether such assignment is voluntary or for valuable consideration. See *Twyne's Case* 1601, 1 Smith's Leading Cases, 11th Ed., page 1. Assignments of the second class may conveniently

be divided into 2 kinds (1) assignments of the whole or substantially the whole and (2) assignments of part of the debtor's property.

The creation of a document by a debtor purporting to transfer his property to another with the intention of putting the property nominally in the name of the other whilst retaining the beneficial interest in himself is an "act of insolvency," *Secretary of State v. Dabi Reddi Nagiah*, 25 M. L. T. 12: 36 M. L. J. 180: 50 Ind. Cas. 593.

Fraudulent intention.—To render an assignment fraudulent under the Bankruptcy laws there must be fraudulent intention on the part of the debtor. *Re. Sackman, Ex parte Foley* 1890 21 Q. B. D. 728. Moral fraud is not necessary, but there must be fraud upon creditors, *Re. Wood* 1872 7 Ch. App. 302. That is to say, a design to prevent distribution of the insolvent's property in accordance with the Bankruptcy laws, *Dutton v. Morrison* 1810 17 Ves. 194 *Ex parte Chaplin* *Re. Sinclair* 1884 26 Ch. D. 319. A fraudulent intention to defeat or delay creditors is generally inferred from surrounding circumstances, and need not be specially proved, *Re. Wood supra*, *Yāramati Krishayya v. Chandra Pazayya*, 20 Mad. 326.

Assignment for past debts.—An assignment by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy, *Worsley v. De Mattos* 1758 1 Bur. 467; *Re. Phillips Ex parte Barton* 1900 2 Q. B. 329. This is not so however when the debt was an advance made upon the promise of the debtor to give security for it at a subsequent time. *Harris v. Rickett* 1859 28 L. J. (Q. B.) 197. *Ex parte Izard, Re. Cook* 1874, 9 Ch. App. 271; *Ex parte King, Re. King* 1876 2 Ch. D., 256. But the onus of proving the existence and *bona-fides* of such a prior agreement is upon the person who sets it up, *Ex parte Kilner Re. Barker*, 1879 13 Ch. D., 245. See also *Kalumalai v. South Indian Export Co.*, 33 Mad. 334: 20 M. L. J. 211. Neither the sale nor the mortgage of the whole of his property is itself an act of bankruptcy if it is made *bona-fide* and for a present equivalent paid or rendered to him, *Ross v. Haycock*, 1834 1 A. D. & E. L., 460. *Marrer v. Peterson* 1868 L. R. 4 Exch. 104. A collusive suit by a debtor and its subsequent withdrawal or compromise to put another party in possession of the immovable property may amount to a transfer of property within the meaning of this section, *Puran v. Atwargir* 13 A. L. J. 434: 29 Ind. Cas. 217.

An assignment of the whole of the debtor's property partly to secure an existing debt and also in consideration of a further advance of money is not necessarily an act of bankruptcy. *Allen v. Bonnet* 1870 5 Ch. App. 577, *Ex parte Wilkinson, Re. Berry* 1882 22 Ch. D. 788. To save such an assignment from being an act of bankruptcy the advance must be made to enable the debtor to continue the business and the lender must have reasonable grounds of knowing this: where the assignment is for the real purpose of securing an existing debt and the advance is a device for concealing this fact, the assignment is an act of insolvency. *Ex parte Johnson, v. Lasceles* 1894 App. Cas. 135. And where a trader assigned all his property to trustees to satisfy the debts due to his creditors, held, that since the deed, in effect, provided for deferred payment and creditors were not bound to wait, such an assignment amounted to delaying and defrauding creditors, and was an act of insolvency. *In the matter of Brij Mohun v. Bungshidhur*, 2 C. W. N. 335. See also *Karsandas v. Maganlal*, 26 Bom. 476, and *Manmohan Das v. N. C. Macleod*, 26 Bom. 765.

Limitation.—"The act of insolvency on which the petition of a creditor is founded must have occurred within three months before the presentation of the petition." Vide Sec. 9 (1) (c) *infra*. On the 28th of June 1919 a creditor presented a petition for adjudicating his debtor an insolvent under Sec. 6 (4) of Act III of 1907. The petition having been presented in a wrong Court was returned and re-presented to the District Court (which was the proper Court) on 1st October 1919. The act of insolvency on which the petition was based was an alleged fraudulent transfer by the debtor of his property on 31st March 1919, and the insolvency petition was presented to the District Court more than three months after that date. On the 21st February 1921, the District Court purporting to act under Sec. 78 of Act V. of 1920, excused the delay in the presentation of the petition and ordered an enquiry into the merits. *Held*, on appeal, that the petition had become barred and the District Court had no power under Sec. 78 to excuse the delay so as to revive the barred right. *Aiyaparaju v. Veeva Venkata*, 44 M. L. J. 303: 1923 M. W. N. 195: 72 Ind. Cas. 488.

Clause (c).—Fraudulent preference. A. is indebted to B. C. D. and E. If A transfers his property wholly or partly to B in preference

to C, D and E, A commits an act of insolvency. Whatsoever the motives of the parties might have been this is not an act of bankruptcy, however, when the debt was in advance made upon the promise of the debtor to give security for it at a subsequent time, *vide* notes under (b).

“Preference” implies an act of free will and there can be no preference where the act is the result of pressure. *Nripendranath Sahu v. Asutosh Ghose*, 19 C. W. N., 157; *Moulu Baksh v. Tezmal*, 20 Ind. Cas. 395: 11 A. L. J. 545. A preference to a creditor must be shown to have been fraudulent with reference to the state of the mind of the debtor, *Nripendranath Sahu v. Asutosh Ghose*, 20 C. W. N., 421: *Official Assignee, Bombay v. Brijkishore*, 3 A. L. J., 614: A. W. N. (1916) 250. In *Butcher v. Stead*, 7 Eng. & Ir. App. 849, Lord Hatherly says “I think the Legislature intended to say that if you the debtor for the purpose of evading the operation of the Bankruptcy laws and in order to give a fraudulent preference make this payment or this charge, it shall be wholly done away with except in cases where the person you have favoured is wholly ignorant of your intention to favour him, and receives payment simply for valuable consideration and without notice of any intention on your part to favour one creditor above another.” See also *Dudapa v. Bishnudas* 12 Bom. 424, *Brown v. Fergusson*, 16 Mad. 499, *Chitamvaram Chetty v. Srinivasa Sastri*, 30 Mad. 6, and also in appeal in 18 C. W. N. 841, *Lala Hakim Lal v. Maashabar Sahoo*, 11 C. W. N. 889: 6 C. L. J. 410: 34 Cal. 99, and *Gopal v. Bank of Madras*, 16 Mad. 397.

For Complete Notes see under Section 54 *infra*.

Clause (d) (1).—This is section 4 (1) of the Bankruptcy Act, 1883. A debtor commits an act of bankruptcy if with the intent to delay or defeat his creditors he does any of the following things *viz.*, departs out of British India, or being out of British India remains himself or begins to keep house.

The act of bankruptcy is complete at the moment of the departure and is therefore not affected by subsequent circumstances, *Ex parte Gardner* 1812, 1 Ves & B. 45. Usually the material facts on which this act of bankruptcy is established are that debts have matured or are maturing and that the debtor departs and remains away without making provision to meet them, *Ex parte Coates, Re Skelton*, 1877, 5 Ch. D., 979. The debtor's intention is material and therefore he may go abroad for the purpose of his business without committing an act of bankruptcy, if he does so with an honest intention and

though as a fact creditors are delayed. *Warner v. Barber*, 1816 Holt. N. P. 175.

Clause (d) (ii).—The absence of the debtor must be an absence from his dwelling house or place of business or from some particular creditor, and must be brought about with the intention to defeat or delay creditors, *Fisher v. Boucher* 1830 10 B. & C., 705. The mere failure of the debtor to keep an appointment with the creditor is not in itself an act of bankruptcy in the absence of any such intent, *Ex parte Meyer, Re. Stepheney* 1871 7 Ch. App. 188. The debtor may commit an act of bankruptcy without physical absence if he adopts an assumed name for the purpose of concealment, *In Re. Alderson, Ex parte Jackson*, 1895 1 Q. B. 193.

Intention.—It is essential that in a petition founded on this act of bankruptcy, the intention to defeat and delay creditors should be specially alleged, *Ex parte Coates, Re. Skelton* 1877 5 Ch. D., 972. *In the matter of William Walton*, 31 Cal. 761, *Ali Hazi Sullaiman v. Hazi Jun Muhammad*, 8 Bom. L. R., 648. An omission of an allegation can be rectified by amendment before adjudication, *Re Fiddian, Ex parte Fiddian* 1892 9 Morr. 65.

The debtor's intention can be inferred from surrounding circumstances and therefore a debtor who withdraws to a retired part of the house to avoid personal application for payment or a banker who closes his bank against customers, or a trader who shuts his shop and leaves home without directions or an address to which communications may be made, commits an act of bankruptcy. This inference can however be rebutted by evidence of the fact that the creditor called at an unreasonable hour, or by other evidence satisfactorily explaining the debtor's conduct in apparently avoiding a meeting with him, *Ex parte Courtis, Re. Courtis*, 1893 9 T. L. R. 387. See also *Kasturchand v. Dhanpat Singh* 23 Cal. 26.

Clause (d) (iii).—Secluding is equivalent to the English phrase "beginning to keep house." It imports a refusal or denial on the part of a debtor to see creditors with the object of defeating or delaying them. The intention of the debtor must be clear and accordingly a denial to a creditor not specifically ordered by him, *Ex parte Foster* 1810 7 Ves. 414, or denial by a debtor sick in bed is thus not an act of insolvency. The intention with which a debtor actually departs from his place of business is material, though he might have altered his intention and come back, *In the Application of Dholan Das to declare the firm of Walldas Hukram insolvents*, 56 Ind. Cas 158.

Clause (e).—This is section 4 (c) of the Bankruptcy Act, 1883. A debtor commits an act of insolvency if execution against him has been levied by seizure of his goods under process in any action in Court, and the goods have been sold in execution of the decree.

Decree for payment of money is defined in *Hart v. Taraprasunno Mukherjee*, 11 Cal. 718, *Vidlanathsami v. Samasundaram*, 28 Mad. 473.

Clause (f).—This is section 4 (1) i of the Bankruptcy Act, 1883. A declaration of inability to pay debts in a petition put in by the debtor is in itself an act of bankruptcy. In *Kalikumar Das v. Gopikrishna Ray*, 15 C. W. N. 990 held that "Sec. 4 of the Act (now Sec. 6) provides that the presentation by the debtor of a petition to be adjudged an insolvent is in itself an act of bankruptcy, and *prima facie* the debtor is entitled to an adjudication." See also *Udaichand Maiti v. Ram Kumar Khara*, 15 C. W. N., 213; 12 C. L. J., 400; *Ponnu Swami Chetty v. Narayanswami Chetti*, 14 M. L. T. 304; 25 M. L. J. 445; 21 Ind. Cas. 293.

Clause (g).—This is Sec. 4 (1) (h) of the Bankruptcy Act, 1883. The notice may be oral and need not be in writing, *Ex parte Nickoll* 13 Q. B. D. 469. A letter written "without prejudice" by a debtor to a creditor giving notice of suspension is admissible in evidence to prove the act of bankruptcy, *Re Dainty*, *Ex parte Holt* 2 Q. B. D. 116.

What is not notice.—The fact that the debtor has called a meeting of the creditors and offered a composition is not sufficient notice, *Re Walsh*, *Ex parte the Trustee* 1885 2 Morr. 112. Nor does a statement by his solicitors that receiving order will be applied for immediately constitute a sufficient notice, *Trustees of Lord Hill v. Rowlands* 1886, 2 Q. B. 124. Nor does a communication to a creditor by a solicitor that he had received instructions from the debtor to issue circular letters to creditors amount to a notice of suspension, *Re Morgan*, *Ex parte Turner*, 1915 2 Mans. 508.

"Though a mere intimation to a creditor that the debtor is insolvent is not an act of insolvency, the giving of notice to a creditor of an intention to suspend payment is an act of insolvency"—*Mercantile Bank v. Official Assignee, Madras*, 39 Mad. 250; 39 Ind. Cas. 942.

A notice by a debtor to his creditors that he had suspended payment of debts will be a sufficient act of insolvency to justify a petition

under Sec. 6 (g) provided the act occurred within 3 months of the presentation of the petition. *Banarasi Das v. Baldes Das*, 82 Ind. Cas. 742: (1925) A. I. R. (O.) 222.

A notice suspending payment of debt by one partner is not an act of insolvency of the firm, *Dehendru Sikdar v. Pursotum Das*, 55 Ind. Cas. 186.

Clause (h).—Under Sec. 55 C. P. C., V. of 1908, where the judgment debtor is arrested in execution of a money decree for payment of money and the judgment-debtor expresses his intention to apply to be declared an insolvent within one month, the Court shall release him from arrest. The arrest or the imprisonment of the judgment-debtor is an act of insolvency on which a debtor can be adjudged insolvent. Vide Sec. 10 (1) (b) *infra*.

“Explanation.”—The acts of insolvency of an agent are the acts of insolvency of a principal. A trader residing out of the jurisdiction of the High Court but carrying on business at Calcutta by a gomasta can be adjudged an insolvent, if his gomasta stops payment and leaves his usual place of business or does any act which if done by the trader himself would have rendered him liable to be adjudicated insolvent. *In Re. Horukchand Golicha*, 5 Cal. 605: 6 C. L. R., 282. The Privy Council in *Kasturchand v. Dhanpat Sing*, 23 Cal. 26 (P. C.) which was an appeal from *In Dhanpat Sing*, 20 Cal. 771, observed “the Statute should be interpreted with reference to the facts of Indian life. And it is a question in each case whether the gomasta occupied such a position that the owner must stand or fall by his act so that his fraud or his flight shall by imputation be the purpose of bringing the case within the statute of insolvency. Their Lordships agree with the Judges who held that the statute admits of application to such cases and that to exclude it may lead to confusion and injustice in many cases. They are by no means prepared to say that Horuk's Case 5 Cal. 605, was wrongly decided though the position of the gomasta there is not stated so fully as they would think desirable if the case was before them for decision.” See also *In the matter of William Walton*, 31 Cal. 761: 8 C. W. N. 553, where the agent was deemed to occupy such a capacity. *In Kalyanji v. Bank of Madras*, 39 Mad. 693, it was held that a debtor can be adjudicated insolvent upon acts of insolvency committed by the agent. See also *In the matter of Brij Mohan Dobey*, 2 C. W. N. 306.

Petition.

7. [5] Subject to the conditions specified in this Act, if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent.

Explanation.—The presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of this section, and on such petition the Court may make an order of adjudication.

NOTES.

Introduction.—The petition for insolvency of a debtor may be presented either by a debtor or by a creditor under certain circumstances and the petition must be presented in the District Court within the jurisdiction of which the debtor resides or carries on business or personally works for gain; and if the petition is in proper form the Court shall pass a vesting order by which from the date of the presentation of the petition all the properties of the insolvent would vest in the Receiver and thereafter fix a date for hearing, and issue notices and advertisements, and on the date fixed for hearing, the Court on being satisfied that the debtor is unable to pay his debts shall make an order of adjudication.

Review.—This is Section 5 of Act III of 1907, and Section 5 of the Bankruptcy Act, 1883. If a debtor who is subject to the English Bankruptcy laws commits an act of bankruptcy, the Court may on a petition presented to it, make a receiving order for the protection of the estate.

The first step which has to be taken by a person, whether a creditor or a debtor himself, who seeks to have the debtor's estate administered for the benefit of the creditors according to the Bankruptcy laws, is a petition to the Court, which has bankruptcy jurisdiction over the debtor.

Difference between the present Act and Act III of 1907.—In Act III of 1907, the Legislature departed from the provisions of the English

Bankruptcy Act under which in the first instance a receiving order is made which is subsequently followed by an order of adjudication. But in the present Act the law is brought in a line with the English Bankruptcy Act and the Presidency Towns Insolvency Act by providing in Section 21 that the Court when making an order admitting the petition may, and where the debtor is the petitioner, ordinarily shall, appoint an *interim* Receiver of the property of the debtor, or any part thereof.

“Conditions specified.”—The conditions specified in the Act are enumerated in Sections 9 and 10 *infra*.

Insolvency Petition by and against joint-debtors or firm.—It was at first held that a declaration of insolvency could not be asked for in one petition against several joint-debtors. *Kalicharan Saha v. Harimohan Basak*, 24 C. W. N. 461: 31 C. L. J. 206 following *Sarodaprasad v. Ramsukh* 2 C. L. J. 318. The views expressed in *Sarodaprasad v. Ramsukh* 2 C. L. J. 318 followed in *Kalicharan Saha v. Harimohan Basak*, 24 C. W. N. 461: 31 C. L. J. 206 were dissented from in *Boliseti Momayya v. Kolla Kotayyu*, 44 Mad. 810: 40 M. L. J. 570: 1921 M. W. N. 330: 29 M. L. T. 288: 14 L. W. 428: 63 Ind. Cas. 916. Sadasiva Aiyar J. in delivering the judgment said: “On the general principles of law governing procedure I don’t see why a single application should not be filed against the members of a joint Hindu family by a petitioning creditor, if those members have been guilty of a joint act or joint acts of fraudulent preferences. Section 47 now Section 5 directs the Court to follow the same procedure in insolvency matters as is followed in Civil Suits. Now, a suit can be maintained by a plaintiff against several defendants where the facts constituting the causes of action are one and the same against all the defendants, Or. 1 C. P. C. *Kalicharan Saha v. Harimohan Basak* merely follows what the learned judges who decided that case considered to be the principles of the decision in *Saroda Prosad Ukil v. Ramsukh*, though they admit that the latter was decided under Ch. XX of the Code of Civil Procedure and not under the Provincial Insolvency Act. Turning to *Saroda Prosad Ukil v. Ramsukh*, Mr. Justice Mookerjee who delivered the judgment of the Bench in that case merely points out several inconveniences which would arise in many cases from entertaining a single application directed against several persons to adjudicate them insolvents and the inconveniences of holding a single trial on such petition. But I think the learned

Judge (with all respect) ignores that there would be great inconveniences also in many cases in holding separate trials, when the debt due to the petitioning creditor is a joint debt of all the persons sought to be adjudicated insolvents and where the latter have been guilty of a joint act or joint acts of insolvency. *In such a case it is neither necessary nor desirable to file separate applications for the adjudication of each of the debtors.*" Following this case it has been decided in the *Maung Kyi Oh. v. Arun Chellam Chetti*, I. L. R. 2 Rangoon. 309: 84 I. C. 968, that a single petition in insolvency may be filed under the Provincial Insolvency Act, 1920, against a Burmese Buddhist husband and his wife when they were alleged to be jointly indebted to the petitioning creditor and to have committed a joint act of insolvency.

The Calcutta High Court in framing New Rules under Section 79 of the New Act, V. of 1920, has now laid down the procedure where the debtor is a firm. The New Rules, 19-27, now enable joint creditors to file a single petition against the joint-debtors instead of filing separate petitions against the debtors individually and *vice versa*. And in conformity with these New Rules the Calcutta High Court in *Satis Chandra Addy v. Firm of Rajnarain Pakhira and Rasiklal Pakhira*, 72 Ind. Cas. 60, held, that where the debtor is a firm the application for insolvency must be in the name of the firm and must be signed in the manner laid down in Rules 19, 22 and 24 framed by the High Court under Section 79 of Act V. of 1920.

"**May.**"—On hearing of the petition for adjudication under Section 10 of Act III of 1907, now Section 27, the Court decides whether or not the debtor's estate is to be administered for the benefit of the creditors under the Act by one or other of the methods prescribed by the Act, i.e., adjudication, composition or a scheme of arrangement, *Re. Pinfold Ex parte Pinfold*, 1892 1 Q. B. 73.

What should the Court enquire.—Under the provisions of the C. P. C. 1882, Section 334-351, a judgment-debtor was required to satisfy the Court of his good faith, *Gladstone Wyllie v. Umes Chandra Chatterjee*, 25 W. R. 96. And he was also to satisfy the court that he came within the provisions of Section 351, and the burden of proof lay on him, *Mumtaz Hussain v. Brijmohan Thakur*, 4 Cal. 888. Even after the passing of the Act III of 1907, in *Nathumal v. District Judge of Benares*, 32 All 547, the High Court expressed the opinion that the Court should dismiss an insolvency petition by a debtor on proof that

he has fraudulently transferred part of the property so as to put it out of the reach of his creditors, destroyed his books of account, and committed other similar acts of bad faith. In *Shaikh Gholam Rahan v. Shaikh Wahed Ali*, 16 C. W. N. 859, Justice Brett *queried* "whether if upon the facts before the Court it is clear to the Judge that the debtor applying for insolvency is not an insolvent is he bound to adjudicate him an insolvent?" It is very important to note that the scheme of Act III of 1907 differs entirely from the scheme of the aforesaid sections of the C. P. C. which relate to insolvency matters. Under Section 351 of the C. P. C. of 1882 the Court could grant an insolvency application only on being satisfied that the debtor had not transferred any part of his property with intent to defraud his creditors, and had not contracted debts and given no unfair preference to any of his creditors, and had not committed any other act of bad faith regarding the matter of the application. Under the Insolvency Act III of 1907, these appear to be grounds for refusing an absolute order of discharge under Section 44, but not grounds for refusing to make an order of adjudication," *Girwaridhari v. Joynarain*, 32 All 645. In *Kalikumar Das v. Gopikrishna Rai*, 15 C. W. N. 990, Jenkins C. J. observed that "Section 4 of the Act provides that the presentation by the debtor of a petition to be adjudicated an insolvent is an act of insolvency, and *prima facie* the debtor is entitled to an adjudication unless some ground is shown for the dismissal of his petition. The mere fact that the Judge was unable to satisfy himself that the petitioner was unable to pay his debts is not such a ground." In *Udaichand Maiti v. Ram Kumar Khara*, 15 C. W. N. 218, the debtor presented an application for being declared insolvent, the creditors mentioned in the application were fictitious, the applicant concealed the real facts and his application was dismissed by the court of first instance. Mookherjee & Carnduff JJ., held that "it is obvious from Section 15 (1) that these are not circumstances which can be taken into account by the court at this stage to determine whether the application should be granted or refused. It is clear that the question whether the debtor has or has not committed acts of bad faith is to be determined by the court not at the preliminary stage when the order of adjudication has to be made but at the final stage when the application is made for final discharge." The same view has been adopted in *Shaikh Somiruddin v. Kadumoyee Dasse*, 15 C. W. N. 244. In *Mohiruddin Sarkar v. The Secretary. Hadal Gramya Rindan Samiti*, 57 Ind. Cas. 977, it has

been held "where the requirements of the Provincial Insolvency Act have been complied with, an order of adjudication should follow almost as a matter of course. Whether the debtor has or has not committed acts of bad faith is to be determined by the Court, not at the stage when the order of adjudication is to be made, but at the final stage when a application is made for an order of discharge." Their Lordships of the Judicial Committee of the Privy Council in *Chatrapat Sing Dugar v. Kharagsing Luchminarain*, 21 C. W. N. 497, observed "the dismissal of Chatrapat's petition by the District Court does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. Presumably it was on this ground too that the High Court dismissed the appeal, no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decisions by the provisions of the Act. In clear and distinct terms the Act entitles the debtor to an order of adjudication when its conditions are satisfied. This does not depend upon the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the Court," 25 C. L. J. 215: 44 Cal. 535. It is no ground for the rejection of a petition to be declared insolvent filed by the debtor that the petitioner may perhaps have been guilty of criminal misappropriation in respect of property belonging to one of his creditors, *Jagannath v. Gangadutt Dobey*, 41 All 486: 17 A. L. J. 565.

What Order should the Court pass.—Where in a petition under Section 7 of the Provincial Insolvency Act, 1920, put in by 2 creditors praying for an order of adjudication and cancellation of certain alienations made by the judgment-debtors about a month previous, the District Judge passed an order adjudicating them insolvents and also cancelling the alienations as transfers coming under Section 6 (b) of the Act, held it is the Receiver and no one else in the first instance who is empowered to take action for the cancellation of the sale-deeds under Section 53 of the Act and the Court has no power to order cancellation on a petition for adjudication, *Gantu Appa Reddi v. Gantu China Appa Reddi*, 1921 M. W. N. 816: 45 Mad. 189, following *Hemraj v. Ramkrishna* (1916) 2 P. L. J. 101.

Fresh Application.—Where an application for adjudication as insolvent is dismissed for default, a fresh application, upon the same

facts, is not barred. *Ramprasad Bhagat v. Mahadev Lall*, 2 P. L. T. 335: 61 Ind. Cas. 870. But when an application for adjudication is dismissed on merits, a fresh application for adjudication is not maintainable. *Abdul Aziz v. Habid Mistry*, 49 Ind. Cas. 229. *Vide* notes under Sec. 13 (f).

8 [6(6)] No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force.

Exemption of corporation, etc., from insolvency proceedings.

NOTES.

Review.—This is Section 6 (6) of Act III of 1907, and corresponds to Section 123 of the Bankruptcy Act, 1883.

Section 6 of Act III of 1907 has been split up into 6 separate sections, with a view to re-arrange its different parts in their logical order. Section 8 merely reproduces Section 6 (6) of the old Act. Sections 12 and 18 reproduce Section 6 (1), 11, Section 6 (2), 10, 6 (3), 9, 6 (4) and (5), and 8, 6 (6).

Incorporated Company.—The reason for this section is that joint-stock company or a limited company is governed by the special law of the Indian Companies Act, VII of 1913, which contains a special procedure for winding up the same in case they are carried on at a loss. It is only a corporation or partnership or association or company registered under the Indian Companies Act that is not liable to Bankruptcy proceedings under the Provincial Insolvency Act.

Unincorporated Company.—The present law of bankruptcy is based on the Bankruptcy Acts 1883 and 1896 (46 & 47 Vict. C. 52, 53 & 54 Vict. C. 71), and the rules of 1886, 1890 & 1891 promulgated under their authority. The Acts do not apply to incorporated companies, but they do to unincorporated companies empowered to sue and be sued by public officers. Firms may proceed and may be proceeded against in their mercantile names, but this rule does not apply to adjudication of bankruptcy. The Bankruptcy Act, 1883, enacts, any two or more persons, being partners, or any person carrying on business in partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case, the Court may, on application of any person interested, order the names of the

persons who are partners in such firm or the name of such persons to be disclosed in such manner, or verified on oath or otherwise as the Court may direct (Sec. 115.)

And the Bankruptcy Rules 1886 contained the further provisions in the matter. Rule 259 runs as follows :—Where any notice, declaration, petition or other document requiring attestation, is signed by a firm of creditors or debtors in the firm name, the partners signing the firm shall add also his signature for example, “Brown & Co. by James Green, a partner in the said firm.” Rule 260 provides:—Any notice or petition to which personal service is necessary shall be deemed to be duly served on all the members of the firm if it is served at the principal place of business of the firm on any of the partners, or upon any person having had at the time of the service the control or management of the partnership business.

Rule 261.—Where a firm of debtors filed a declaration of inability to pay their debts or bankruptcy petition the same shall contain the names in full of the individual partners, and if such declaration or petition is signed in the firm name, the declaration or petition shall be accompanied by an affidavit made by the partner who signs the declaration or petition showing that all the partners concur in the same.

Rule 262.—A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner of the firm.

Rule 263.—In case of partnership, the debtors shall submit a statement of their partnership affairs.

Rule 264.—No order of adjudication shall be made against the firm in the firm name, but shall be made against the partners individually.

These English Rules have been adopted in India and incorporated in the New Rules framed by the High Courts under Sec. 79 of the Act. *Vide* Rules 19, 20, 21, 22, 23, 24 of the Calcutta High Court, and rules 28 (1), (2), (3), (4), (5), (6), of the Madras High Court, and Rules 22—27 of the Allahabad High Court. It follows, therefore that a company not registered under the Indian Companies Act is liable to bankruptcy proceedings. A Hindu joint-family consisting of several members may be declared insolvent; so also the partners or members can be proceeded against in the name of the firm under the Provincial Insolvency Act, and a declaration of bankruptcy can be asked in one

petition against several joint-debtors. Formerly there was no provision in the old Insolvency Act for proceeding against 2 or more persons being partners in the name of the firm, *Kalicharan Saha v. Harimohan Basak*, 24 C. W. N. 461: 31 C. L. J. 206: following *Sarodaprosad Ukil v. Ramsukhchandra* 2 C. L. J. 318, but under the present Act and the New Rules framed thereunder a single petition may be filed against the members of a joint Hindu family and other joint-debtors. *Bolisetti v. Kolla Kottayya*, 44 Mad. 810. *Satischandra Addy v. Firm of Rajnarain Pakhira and Rasiklal Pakhira*, 72 Ind. Cas. 60. *Maung Kyi Oh v. Arun Chellum Chetty*, 2 Rangoon 309: 84 I. C. 468.

Minors.—If one member of a firm is an infant, a receiving order cannot be made against the firm simply, but it may be made against the firm other than the infant partner. *Lovell & Christmas v. Beauchamp*, 1894 A. C. 607; *Ex parte Beauchamp*, 1894 1 Q. B. 1. So under the Indian Act, it has been held that no insolvency petition can be presented against a minor partner, as a minor cannot be adjudicated insolvent. *Sannyasi Charan Mondole v. Asytosh Ghosh*, 42 Cal. 225, *Janki Prasad v. Gridharilal*, 16 O. C. 68: 19 Ind. Cas. 704. So also in *Jagnohan Narain v. Grish Babu*, 42 All 515: 18 A. L. J. 611: 58 Ind. Cas. 557, it has been held that in view of the terms of Section 247 of the Contract Act the adjudication of a minor as insolvent is illegal. *Re. Sital Prasad*, 20 C. W. N. 1065.

Following *Sannyasi Charan Mondole v. Krishna Dhan Bannerjee*, 49 C. 560 (P.C.): 67 I. C. 124 and *Sadusiva Mudaliar v. Hajee Mahomed Sait*, 27 C. W. N. 677 (P.C.): 37 C. L. J. 569: 72 I. C. 48: 44 M. L. J. 396, it has been held in the matter of *Radha Krishnaiah Chetty*, 84 I. C. 128, that when the adult sons of a Hindu father are adjudicated insolvents during their father's lifetime on account of debts incurred in the carrying on of a business, the shares of their minor brothers in the family property do not vest in the Official assignee and the latter is not entitled to sell or otherwise deal with such shares.

Acts of Insolvency of the Firm.—A debt owing by one partner only will not support a joint adjudication against him and his co-partners. *Ex parte Clarke*, 1 Dea & Co. 544. But a debt owing by all the partners of a firm is sufficient to support an application. *Ex parte Battams*, (1900) 2 Q. B. 698. For notes on Partnership Assets &c. *Vide* notes under Sec. 28 (3) and Sec. 61 for administration of the partnership assets.

9 [6 (4)] (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—
Conditions on which creditor may petition.

(a) the debt owing by the debtor to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees, and

(b) the debt is a liquidated sum payable either immediately or at some certain future time, and

(c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

[6 (5)] (2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtors being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

NOTES.

Review.—This is section 6 (4) & (5) of Act III of 1907 and is based upon section 6 (1) of the Bankruptcy Act, 1883. Clause (4) of the old Act “ that the debtor resides or carries on business or personally works for gain within the local limits of its jurisdiction ” is made up into a new section *viz.*, Sec. 11 *vide infra*.

Creditor.—To entitle a person to file an application for adjudication as a creditor he must be a creditor at the time when the act of insolvency is committed. M. in whose favour a promissory note had been executed by L. on the 23rd March applied to have L. adjudicated insolvent alleging as the act of insolvency a transfer executed by L. of his property on the 13th March. Held, that in as much as M. was not

a creditor of L. on the 13th March he was not competent to present the petition for adjudication. *Muthia Chettiar v. Luzmi Narasa Aiyar*, 13 L. W. 141: 61 Ind. Cas. 756.

Sub-section (1). "Unless." "Letters of administration may be granted to a creditor although the liabilities of the deceased debtor appeared to be in excess of his assets. Application in the Insolvency Court is not the creditor's only remedy. It is discretionary with the Court to administer the estate in its Testamentary and Intestate jurisdiction or on its Insolvency jurisdiction." *In the goods of Makhan Lal Chatterji*, 15 C. W. N. 350.

Who can present Insolvency petitions.

(1) *Individual creditors*.—Generally speaking, any person who has a right to claim immediate payment of a sum of money and is capable of giving a valid discharge to the debtor may, if other prescribed conditions are satisfied, maintain a bankruptcy petition against the debtor; but there are some cases in which a creditor can present a petition against a debtor, notwithstanding that if the debtor were solvent, the creditor could not demand immediate payment, *Re. Raati, Ex parte Ruati*, 1897, 2 Q. B. 80.

(2) *Incorporated company*.—An incorporated company may be a petitioning creditor, *Ex parte Dan Rylands v. Re. Collier* 1891, 64 L. T. 742. The petition must be in the name of the company, and may be signed and verified in the manner as laid down by rules framed under the Act. If it is in liquidation, the petition must be in the name of the company and not of the liquidator, *Re. Winter Bottom, Ex parte Winter Bottom*, 1886, 18 Q. B. D. 446.

(3) *Unincorporated company*.—A petition by an unincorporated company or co-partnership duly authorised to sue may be presented in the name of the company by any one of the partners or members of the company, Order XXX r. 1 C. P. C.; and it may be signed by one partner on behalf of the firm. *Bolisetti v. Kolla Kottayya*, 44 Mad. 810: *Satischandra Addy v. Firm of Rajnarain Pakhira & Rasiklal Pakhira*, 72 Ind. Cas. 60. *Vide New rules*.

(4) *Joint-creditors*.—One of two joint-obligees under a bond is not by himself a good petitioning creditor, *Brickband v. Newsome* 1835 2 Mont & A. 283. But when one of three joint-creditors has died, a petition may be presented by two survivors, *Re. W. Tucker, Ex parte J. W. Tucker* 1895 2 Mans 358.

(5) *Executors*.—One of several executors may present a petition in respect of a debt due to the executors, *Exparte Brown*, 1832, 1 Deac & Ch. 118.

(6) *Trustees*.—A person to whom a debt is due as trustee may present a petition in certain cases, for example, when the beneficial owner is under disability, *Exparte Quiley, Re. Adams*, 1878, 9 Ch. D. 307.

(7) *Bankrupts*.—An undischarged insolvent can present a bankruptcy petition in respect of debts due to him which his trustee either does not or cannot claim, *e.g.*, salaries due to him, *Kitson v. Hardwick*, 1872, L. R. 7. Ch. Prac., 473.

Creditors precluded from making petitions are (1) creditors privy to the act of bankruptcy, (2) parties to a composition deed, (3) creditors whose object is to put pressure on a debtor for some collateral or inequitable purpose.

Creditor Assenting to a composition.—A creditor who is a consenting party to a deed of arrangement executed by the debtor for the benefit of all the creditors cannot rely on the deed as an act of insolvency and apply for adjudication on the basis of the same. *Rukmani v. Rajagopal*.—47 M. L. J. 495: 1924 M. W. N. 813: 84 I. C. 281. The question of law argued in this case was that there was a difference between the law in England and India on the question of the disability of the creditor who assented to a deed of arrangement. The contention was that when sec. 9 now in force, was enacted the Indian Legislature had before it the English Act of 1914, but did not chose to enact the clause relating to deeds of arrangement towards the end of sub-section (1) of sec. 4, Ramesam J., in delivering the judgment, held “we don't see how the addition of a clause in sec. 4 (1) b. in the English Act of 1914, the effect of which seems to extend the disability to a non-assenting creditor also in cases where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement (under sec. 24 of the Deeds of Arrangement Act, 1914, according to which any creditor is prohibited from applying, after the expiration of one month from the receipt of a notice from a trustee under the deed), can affect the law in India.” This extension to non-assenting creditors is not available in India and this seems to be the only effect of the addition in the English Act. The old law is not affected.

ted either in England or in India, as to assenting creditors. *Khetamal v. Chuni Lal*, 2 All 173 (180).

Clause (a).—“Creditor” includes a decree-holder, and a “debtor” includes a judgment-debtor, *vide* Sec. 2 (1) a. But it does not include a decree-holder who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies, *Parbati v. Raja Shamrikh*, 20 A. L. J. 147.

Statutory Interest & Costs.—Statutory interest and costs on a judgment debt become a part of the judgment-debt, and may be added to the judgment debt to make up the required amount £500. *Re. Lehmann, Ex parte Hasluck*, 1890, 7 Morr., 181.

Clause (b) Liquidated Sum.—The debt must be a liquidated sum, that is to say, an agreed amount of damages either in case of a breach of contract or in an action, the definitely ascertainable amount that may be indisputably due. So a claim for not making re-delivery of shares lent by one person to another is not a debt or sum of money due or claimed to be due, *Owen v. Ruth*, 1854, 23 L.J. C.P., 105. To constitute a valid petitioning creditor's debt, there must be a certain sum, admittedly due, and certainly payable to the person who presents the petition. It must be a sum certain in amount, or the amount of which is capable of being easily ascertained. *Robson*, p. 206. But a claim by a lender of Government stocks against the borrower for not re-transferring the stocks may be a good petitioning creditor's debt, *Alterson v. Vernon*, 1890, 3 Term Rep. 539. A liability to pay damages is not a liquidated sum payable, either immediately or at some future time, and cannot be made the basis of a petition until the damages have been liquidated. *Re. Miller*, 1901, 1 K. B. 51. For the purpose of ascertaining the aggregate amount owing to creditors in respect of an application under old section 6 (4), now section 9, the difference between the contract rates of sale and purchase under a contract entered into by the debtor constitutes a liquidated sum within the meaning of clause (b) of the sub-section. *In the application of Dholan Dass to declare the firm of Walbdas Holaram insolvents*, 56 Ind. Cas. 158.

Bill of Exchange.—Money due on a bill of exchange duly accepted is a liquidated amount and the drawer of a bill of exchange remains a surety in spite of its dishonour and can after payment in respect of it maintain an action on it and also petition in insolvency proceedings against the acceptor even though the bill is not in his hands. *Uhetan*

Dus Mohan Das v. Ralli Brothers, 83 Ind. Cas. 135, following *Indian Specie Bank v. Nagin Das Hurjivan Das*, 18 Bom. L. R. 689: 35 Ind. Cas. 628.

Court's Competency to enquire as to the amount of the liquidated sum.—

Section 9 (b) seems to show that a debt must be indubitably due, but can an Insolvency Court make an enquiry into a question of this nature? Sec. 24 (1) (a) lays down that the Court shall require proof amongst other matters, of the fact that the creditor is entitled to present the petition. This undoubtedly refers back to Sec. 9. Sec. 9 lays down the conditions which entitled a creditor to present a petition against a debtor. In these is included there must a debt due to the creditor aggregating not less than Rs. 500/-. Therefore, it is incumbent on the creditor to prove the debt. The Insolvency Act, V. of 1920, is based on the English Bankruptcy Act. Sec. 5 (5) of that Act provides expressly for an alternative reference of the creditor in such circumstances to relief by regular suit. The omission of any similar provision from the Indian Act indicates that the creditor must be allowed under Sec. 24 to prove the debt when the debtor denies it. Further, Sec. 25 provides for dismissal of the petition in failure of the creditor to prove his right to present it, and this obviously involves the necessity of proving that right in order to avoid dismissal. Therefore an Insolvency Court will not be justified in referring a petitioning creditor to a regular suit to prove his debt. *A. K. R. M. C. T. Chetty Firm v. Maung Aung Bwint*, 1923 A. L. R. 21 (Rangoon).

For definition of the word 'Debt' vide notes under Sec. 2 (a) supra.

Clause (c).—"Three months." In the computation of time, month means calendar month, and the day on which the petition was presented is to be excluded, *Re, Hansom, Ex parte Frester* 1857, 4 Marr. 98. If an act of bankruptcy is committed on Aug. 13, a petition presented in Nov. 13 following is in time, *Ibid*.

Sec. 9 (1)c makes the occurrence of an act of insolvency within three months of the date of presentation of a creditor's petition a condition precedent to a lawful presentation, and this provision is quite independent of the statute of limitation. The act of insolvency on which the petition of a creditor is grounded must have occurred within three months before the presentation of the petition. On

the 28th June 1919 a creditor presented a petition for adjudicating his debtor insolvent. The petition, having been presented in a wrong Court, was returned, and re-presented to the proper Court on 1st of October 1919. The act of insolvency on which the petition was based was an alleged fraudulent transfer of the debtor of his property on the 31st March 1919, and the insolvency petition was presented to the proper Court more than three months after that date. On the 21st February 1921 the District Court purporting to act under Sec. 78 of Act V. of 1920 excused the delay in the presentation of the petition and ordered an enquiry into the merits. *Held*, on appeal, that the petition had become barred, and the District Court had no power under Sec. 78 to excuse the delay. *Kiyaparaju v. Veeva Venkata*, 44 M. L. J. 303: 1923 M. W. N. 195: 72 Ind. Cas. 488.

In *Chavadi Ramasami Pillai v. Venkateswara Aiyar*, 42 Mad. 13: 35 M. L. J. 531: 48 Ind. Cas. 952, it is held, that the date on which the act applied against is done and the last day if *dies non* should be excluded.

Election of Remedies.—The plaintiff who was the owner of a ring of the value of Rs. 1,000 lent the same to the first defendant who was also liable to the plaintiff for Rs. 2,072-8, being his contribution in respect of a joint bond. Further the plaintiff was liable to the first defendant on a pro. note for Rs. 2,500. The plaintiff presented an insolvency petition against the first defendant alleging that the first defendant was indebted to him for Rs. 3,072-8 made up of Rs. 2,072-8 and Rs. 1,000, the value of the ring, which he alleged, the first defendant refused to return, and that he was a creditor of the first defendant for Rs. 572-8 deducting Rs. 2,500 due from him on the pro. note. The first defendant was adjudicated insolvent on that petition. The plaintiff again brought a suit to recover the ring from the possession of the second defendant. *Held*, that the plaintiff definitely elected to abandon all his rights to the ring in favour of the first defendant by alleging that the insolvent owed him Rs. 1,000 as a liquidated sum, and setting off about half of that sum against a debt due from him to the insolvent and using the balance in his favour to support his insolvency petition. *Held* also that at the time of the pledge to the second defendant the first defendant had a good title to the ring and the plaintiff had none, or at any rate, the title that vested in the first defendant at least on the date of his adjudication when plaintiff gave up finally all further interest in the ring, enured to the benefit of the

bona fide pledgee, the second defendant, and that the plaintiff therefore had no cause of action against the second defendant who took a pledge of the same without notice of the plaintiff's claim after the presentation of the petition. *Sinnam Chetti v. G. S. Alagiri Iyer*, 1924 M. W. N. 6.

Sub-section (2).—This clause should be read with Sec. 47 *infra*. This is sec. 6 (2) of the Bankruptcy Act, 1883. The mortgage or other charge, the holding of which constitutes a person a secured creditor, must be a mortgage or charge on the property of the debtor. A security on the property of a third person even though it is for the same debt, does not constitute the holder a secured creditor, *Ex parte West Riding Union Banking Co., Re Turner*, 1881, 12 Ch. D. 105. The holder of a bill of lading or of a bill of exchange accepted by the consignee of goods for sale on the delivery up of the bills of lading is a secured creditor of the acceptor, *Ex parte Brett Re. Howe*, 1871, 6 Ch. App. 838. A landlord whose rent is in arrear is not a secured creditor simply because he has a power of distress, *Thomas v. Patent Leonite Co.*, 17 Ch. D., 251.

A secured petitioning creditor has 2 alternatives—(1) to give up the security *i.e.*, his claim on the property mortgaged or charged with his debt in which case he will rank along with other creditors and will have dividends with them or (2) that he may value his security, *i.e.*, the property charged with his debt, and deducting the amount of the value of his security from his total dues, he will be considered as an unsecured creditor with regard to the balance.

For other notes see under Sec. s. 28 (6) and 47 *infra*.

10. [6 (3)] (1) A debtor shall not be entitled to present an insolvency petition unless *he is unable to pay his debts and—*

Conditions on which debtor may petition.

(a) his debts amount to five hundred rupees;
or

(b) he is under arrest or imprisonment in execution of the decree of any Court for the payment of money; or

(c) an order of attachment in execution of such a decree has been made, and is subsisting against his property.

(2) [New] *A debtor in respect of whom an order of adjudication made under this Act has been annulled, owing to his failure to apply, or to prosecute an application for his discharge, shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made.*

NOTES.

Review.—Section 10 (1) a, b, c is Sec. 6 (3) a, b, c of Act III of 1907 and sub-section (2) is new. The corresponding section in the English Bankruptcy Act, 1883, is Sec. 1 (f).

“This section deals with a debtor’s petition and reproduces Sec. 6 (3) of Act III of 1907 with the addition of the proviso which is a corollary to the amendments introduced in Sec. 16, now 28, and s. 44 now 41, regarding the annulment of an order of adjudication.”—*Notes on Clauses.*

“**Unable to pay.**” The reason for introducing these words have been explained in the Statement of Objects and Reasons, *supra*, thus:

“It is now settled law that under the Act, as it stands, it is not open to the Court to reject the petition of a debtor on the ground that the application is an abuse of the law. While admitting that the object of an insolvency law is to deal with all insolvents, whether honest or not, and that no applicant who is in fact insolvent should be liable to have his petition dismissed *in limine*, it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case, the debtor being required to show that he is in fact *unable to pay* his debts and that he has not concealed his property. These changes in the existing

law are effected by the amendments in clauses 9 and 10 (2) and by clause 12 which inserts a new section 16A as to protection orders on the lines of section 25 of the Presidency Town Insolvency Act, 1909."

It should be noted that the words "unless he is unable to pay his debts" have for the first time been brought into the Act by the Act of 1920; in other words, it is necessary for the debtor to establish *first*, that he is unable to pay his debts, and *secondly*, that either his debts amount to Rs. 500 or he is under arrest or imprisonment in execution of a decree for payment of money, or an order of attachment in execution of such decree has been made and is subsisting against his property. These are the conditions specified in the Act, and when these conditions have been fulfilled the Court has no option but to declare the person presenting the application insolvent. No doubt, under the old Act of 1907, it was unnecessary for a person presenting such an application to show that he is unable to pay his debts, but that is for the obvious reason that the old Act did not require him to show that he was unable to pay his debts. This is a matter which the Court under the New Act has to investigate and it can only investigate such matters on such materials as are placed before the Court by the party making the application for adjudication of insolvency. *Gobind-prasad Gir v. Kishan Lal*, 1924 A. I. R. (Pat.) 166.

Under the provisions of Ch. XX. of the C. P. C. 1882, it was held in *Jwala Nath v. Parbati Bibi*, 14 Cal. 691, that a Court cannot refuse the application of a judgment-debtor seeking to be declared insolvent under this chapter unless it found affirmatively that the applicant had brought himself within the penal clauses (a), (b), (c), (d) of Sec. 351 of the Code; and the fact that his scheduled assets exceeded his liabilities did not disentitle him to such relief. It is stated "it is quite an error to suppose that the man is not entitled to be declared insolvent because the sum total of his assets is larger than the sum total of his debts. It may well be and is frequently the case that a man's securities are locked up and are not available for the time he is called upon to pay his debts; but he is none the less entitled to be declared insolvent unless he is found guilty of dishonest conduct. The practice of leaving a man to the mercy of his creditors who with a view of extracting money from him gets him locked up in jail after he has voluntarily placed the whole of his property at the disposal of his creditors is in my judgment a practice which cannot be too strongly reprehended." *Satischandra Addy v. Firm of Rajnarain Pakhira and Rasiklal Pakhira*, 72 Ind. Cas. 60.

"Proof of inability to pay." "With reference to this addition it has been objected that it will involve preliminary enquiry into matters which had to be gone into fully at a later stage, particularly if it has been alleged that there has been any fraudulent concealment of assets. To meet this objection we have provided that at the stage with which section 14 deals *prima facie* proof only shall be required of the debtor's inability to pay his debts"—*Select Committee Report* dated 24th September, 1919. In the *Laxmi Bank Ltd. Poona v. Ramchandra Narayan Apte*, 42 Bom. 757: 24 Bom. L. R. 292, Macleod, C. J., held in appeal that "the Joint-Judge dealt merely with the question whether the debtor was unable to pay his debts, and though it was rightly held that the insolvency should proceed under the provisions of Act III of 1907, he appears to have thought that the New Act had made a *change* with regard to what was required to be proved before it could be decided that the petitioner had a right to present the petition. As a matter of fact there is no material *difference* in this respect between the Act of 1907 and the Act of 1920. Under Sec. 11 (1) of Act III of 1907 the debtor has to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation of the opposing creditor the Court is satisfied that the statement is not correct, it can dismiss the petition. But if he debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the Court is not justified in holding that he is able to pay his debts; but should admit the petition, so that the interests of the creditors may be benefitted by the special powers given to the Court while administering the insolvent's estate." The provisions of Ss. 10-25 are intended to prevent the abuse of debtors filing their applications as a method of evading liability of arrest and getting out of payment of their debts. A finding that a Judge is not satisfied that the appellants are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reason for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. *Muthura Ram v. Baldeo Ram*, 80 Ind. Cas. 21: 1924 A. I. R. (All.) 800.

Clause (a).—Though a decree-holder who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies is not a creditor (*vide Parbati v. Raja Shamrik*, 20 A. L. J. 147) the existence of a Rent Court decree in excess of the prescribed minimum of

Rs. 500 against a debtor entitled him to an order of adjudication, *Munna Singh v. Dig Bijai Singh*, 19 A. L. J. 273.

Clauses (a) (b) (c).—This section points out the limitations or conditions to which an application for insolvency is subject, *Vide* Sec. 7 *supra*. It provides that the debtor shall not be entitled to present an insolvency petition unless one of the 3 conditions is fulfilled, *viz.*, either that his debts amount to Rs. 500 or that he has been arrested or imprisoned in execution of the decree of any court for the payment of money or that an order of attachment in execution of such decree has been made and is subsisting against his property. If any of these 3 elements is present the application under Sec. 5 now 7 must be entertained by the Court. It is obvious from Sec. 15 now Sec. 25 that before the Court can make the order of adjudication the Court has to be satisfied with the proof of the right to present the petition, in other words, the requirements of Ss. 5 & 6 now Ss. 7 & 10 have been fulfilled, *Udaichand Maiti v. Itamkumar Khara*, 15 C. W. N. 213. In *Chatrapal Sing Dugar v. Kharagsing Luchminarain* 21 C. W. N. 407 (P. C.) the Judicial Committee of the Privy Council have laid down "that on the debtor's complying with all the conditions specified in the Act *e.g.*, Sec. 6 of Act III (or Sec. 10 of Act V) he is entitled as of right to an order adjudging him an insolvent. The mere fact that the judge was unable to satisfy himself that the petitioner was unable to pay his debts is not such a ground for the dismissal of the debtor's application for insolvency." "Where the requirements of the Provincial Insolvency Act have been complied with an order of adjudication should follow as a matter of course. Whether the debtor has or has not committed acts of bad faith is to be determined by the Court not at the stage when the order of adjudication has to be made but at the final stage when the application is made for discharge, *Mohiruddin Sarkar v. The Secretary Hadal Gramya Rindan Samity*, 57 Ind. Cas. 977.

Failure to keep or Produce Accounts.

"The only things that are necessary to be decided before adjudication are whether the debtor is entitled to present the petition, and the debtor has committed the alleged acts of insolvency," *Kalikummar Das v. Gopikrishna Rai* 15 C. W. N. 990, *Jeer v. Rangaswami*, 36 Mad. 402. So *In the matter of Vithaldas Kalidas*, 9 Ind. Cas. 632, it was held that the fact that "the applicant had not kept his accounts regularly is a matter which may be considered when he applies for dis-

charge—it is not relevant to the order of adjudication.” Held also in *Shaikh Samiruddin v. Kadumoyee*, 15 C. W. N. 244 that where an application by a debtor to be adjudged an insolvent was refused on the ground that the debtor had transferred a portion of his property in lieu of dower, and had thus committed an act of bad faith, such questions do not arise for consideration until after the order of adjudication has been made and the insolvent applies for final discharge, and the order for adjudication could not have been refused on the ground stated.” See also *Trilokinath v. Badridas*, 36 All 250: 12 A. L. J. 355, 23 Ind. Cas. 4; *Gangaram v. Ramchandra*, 9 N. L. R. 91, 20 Ind. Cas. 250.

Clause (c).—“*Attachment.*” It is only a debtor against whom an order of attachment by the Court is actually subsisting that can present a petition under this section, and in delivering the judgment their Lordships observed “we cannot believe that it was the intention of the Legislature that any judgment-debtor against whose property, an order of attachment had been made could some years afterwards come into Court and apply to it to declare him an insolvent on the strength of a long-dropt proceeding for attachment,” *Jamni v. Muhammad Azim Ali*, 25 All 204, 23 A. W. N. 11.

Sub-section. (2).—Sec. 10 (2) is new and is intended to be penal in as much as on the failure of the insolvent to apply for his discharge within the time fixed by the Court on his adjudication or to prosecute an application, the adjudication order will be cancelled, and the protection of the Court withdrawn, and the debtor and his property will be subject to arrest, imprisonment, attachment and sale. And he will not be entitled to present a fresh application for insolvency without the leave of the Court which will not be granted unless he can satisfy the Court that he was prevented by sufficient reasons from presenting and prosecuting the application for his discharge.

Defects in Act III of 1907.—“One of the principal defects in the existing law (Act III of 1907) arises from the fact that the conduct of the debtor in many cases never comes under the scrutiny of the Court. The stage at which the misconduct of the debtor should come before the court and at which most of the provisions affecting a fraudulent insolvent would operate is when he applies for his discharge. But there is nothing in the Act (III of 1907) which requires him to apply for his discharge and in practice such applications are rare. To remedy this unsatisfactory state of the law, it is proposed

to include in the Act provisions which will compel an insolvent to apply to the court within a prescribed period for his discharge or to lose the protection afforded by the insolvency proceedings. The Court will have power to extend the prescribed period and when adjudication order is annulled owing to the failure of the insolvent to apply in time for his discharge, a fresh petition on the same facts will be barred."—*Statement of Objects and Reasons*.

"The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. I will pursue for a moment the course of the debtor; he files his petition, and if he is in jail, he automatically gets his release under the existing Act (III of 1907), and he is practically protected from going to jail again. That is sufficient for him; that is all he wants; he does not want to pay his debts; all he wishes is to escape the penalty of jail. It is not necessary for him to apply for his discharge, and until he applies for it, the Court has practically no power over his misdoings. The existing Act, it is true, lays certain disabilities on an undischarged insolvent, but these do not affect the dishonest debtor. He cannot borrow money without disclosing his condition. But, in the first place, he probably does not know that there are any such disabilities at all; if he does, he borrows all the same in disregard of the Act, and nobody takes the trouble to prosecute him.....This is the state of things that we have tried to remedy by this Amendment Bill. We propose in the first place to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed by the Court, which we hope will in most cases be a fairly short one. If the insolvent does not apply for his discharge and it must be remembered that his doing so will enable the Court to deal with any malpractices he may have committed, he will lose the protection of the Court altogether. His adjudication will be annulled and it is provided that he cannot file another petition on the same facts....."
Sir George Lowndes' Speech.

11. [6(2)] Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned, where he is in custody :

Court to which petition shall be presented.

[New] *Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice.*

NOTES.

Review.—This is Sec. 6 (1) d of the Bankruptcy Act, 1883, and Section 6 (2) of Act III of 1907, and the proviso is new. Under the English Law a petition will not be good unless the debtor is domiciled in England within a year before the date of the presentation of the petition, and has ordinarily resided or had a dwelling house or a place of business.

“ This section reproduces S. 6 (2) (of Act III of 1907) with the addition of a proviso which is designed to cure a defect. S. 6 (2) laid down where an insolvency petition was to be presented but did not contain any saving in the event of the petition being presented in the wrong Court. The point was raised in *Madho Pershad v. Walton* (18 C. W. N. 1050) where the insolvent successfully presented an appeal on the ground that the petition had been presented in the wrong Court. The proviso is intended to stop this loop-hole in Act III of 1907.”—*Notes on Clauses.*

Jurisdiction. The Court having jurisdiction under the Act is the District Court or any Court specially empowered by the Local Government in that behalf (S. 3 *supra*). In *Re. Tarinicharan Guha* 11 B. L. R. App. 25, and *In Re. Howard Bros.*, 11 B. L. R. 254, it was held that “ residence ” within the meaning of the section may mean carrying on business, although at the time not actually residing. In every case, residence is a question of fact, and it must depend upon the particular circumstances. The general practice is to accept as the person's residence the place where throughout the year you would ordinarily expect him to be found. The term residence is naturally a flexible one, but in the case of persons who are traders carrying on business at several places, their place of residence is manifestly the place where they earn a living and do their daily work, nor does that place cease to be their residence because for purposes of rest or recreation or family ties they occasionally return

to their family house where they and their family have been brought up. *Municipal Board, Barielly v. Hafiz Alabaksh*, 22 A. L. J. 457.

"**Resides.**"—In *Srimati Anilabala Chaudhurani v. Dhirendra Nath Saha Chaudhuri*, 32 C. L. J. 314, it has been held that "the term 'residence' is an elastic word, of which an exhaustive definition cannot be given; it is differently construed according to the purpose for which enquiry is made into the meaning of the term; the sense in which it should be used is controlled by reference to the object, *Mahomed shuffi v. Laldin*, 3 Bom. 227 and *Shri Goswami v. Shri Govardhan* 14 Bom. 541. The term 'residence' is equivalent to "the abiding or dwelling in a place for some continuance of time" and to constitute a residence, there must be a settled fixed abode or intention to remain permanently, at least for a time, for business or other purposes. The term 'residence' may be used in two senses, the one denoting the personal habitual habitation, the other the constructive, technical and legal habitation. When a person has a fixed abode where he dwells with his family, the places of his family, the places of his personal or legal residence are the same. When, on the other hand, a person has no permanent habitation or family but dwells in different places as he happens to find employment, he must be considered as residing where he actually or personally resides. But some individuals have permanent habitations where their families constantly dwell, yet they pass a great portion of their time in other places, such persons have a legal residence with their families and a personal residence in other places, and the word 'residence' may, with respect to such persons, be used in relation to either their personal or their legal residence. From this point of view, one may have two places of residence, in one of which he resides during one portion of the year, in the other during the remaining portion; what may be said to be the place of personal residence during one portion of the year thus becomes place of legal residence during the remainder of the year and *vice versa*: *Walcot v. Batfield*, 1854 Kay 534: 101 R. R. 719. Generally, if a person has two or three establishments every one of them may be called his residence, and not less so because he may not go there for some time. If he keeps an establishment in it, the place is still his residence, and thus he may be said to have his residence in two or three different countries. The question is entirely distinct from that of domicile which is often wholly independent of actual residence, *In Re. Moir* 1884 25 Ch. D. 605 and *In Re. Wright*, 1915 App. Cas. 717."

“Ordinarily resides.”—A foreigner who had a room in a hotel in London for 18 months before presentation of a petition and paid for the room continuously during the time has “ordinarily resided in England,” *Re. Norris, Exparte Reynolds*, 1883, 5 Moor. 115. A Scotsman who pays several visits in London, has a bed-room in a lodging where he stops intermittently cannot be said to have ordinarily resided in England, *Re. Erskine, Exparte Erskine*, 1893 10 T. L. R. 32. In *Abdul Rejak v. Basiruddin Ahmed*, 17 C. W. N. 405, in discussing the question the High Court observed “it is clear upon the evidence that although the petitioner ordinarily resided at Delhi, towards the end of 1905 he came to the suburbs of Calcutta and established a factory and resided there up to 1908; and carried on business which was closed on account of financial difficulties about that time. He had to go to Delhi to look after suits against him in the Delhi Court. It has been therefore strenuously argued on behalf of the opposing creditor that under the circumstances he could not be taken to have ordinarily resided within the jurisdiction of the Court. In our opinion there is no force in this contention. It is not necessary for the petitioner to have resided for a long time at a place within the jurisdiction of the Court and it has been held in the case of *Exparte Hequard* 1889, 24 L. B. D. 71, that even temporary residence for a time and for a particular purpose is enough to give the Court jurisdiction.” In *Madho Pershad v. A. L. Walton*, 18 C. W. N. 1050, A. L. Walton was employed as a guard in the B. N. Railway. He resided at Dungargarh in C. P., but he ran his trains ordinarily from Dungargarh to Nagpur. He also worked from Dungargarh to Kharagpur but had no permanent residence at that place. Insolvency was lodged in the Court of the District Judge, Midnapore. “The only question for controversy was, whether the petition had been presented in a Court having jurisdiction under the Provincial Insolvency Act in the local area in which the debtor ordinarily resides, or carries on business or personally works for gain within the meaning of Sec. 6 (2). The term ‘resides’ is not defined in the Statute but its ordinary interpretation is explained in *Kumud Nath Raichaudhuri v. Jatindranath Chaudhuri*, 38, Cal. 394: 13 C. L. J. 221. The mere fact that when at Kharagpur he stopped with Atkins does not show that he resided at Kharagpur.” See also *In Re. Momet* 21 Cal. 634. And in *Sugamaniam v. Pichai*, 10 Ind. Cas. 786, it is held that where a person takes a temporary residence at a place with the object of filing his schedule of insolvency there the Insolvency Court of the locality

will refuse to entertain his insolvency petition. It is enough if the debtor has remained within the limits of the District in which he presented the petition, though he may not have a permanent or continuous residence within it and may have occasionally gone outside the District and returned to it. Oldfield J. in delivering the judgment in *Lakshminarain Aiyar v. C. R. Subramania Aiyar*, 45 M. L. J. 129: 1923 M. W. N. 328: 73 Ind. Cas. 74: 1923 A. I. R. 585 (Mad.), held "we have been referred to definitions of 'residence' adopted by two learned Judges of the Calcutta High Court for the purpose of Or. 9. C. P. C. in *Kumud Nath Raichaudhuri v. Jatindranath Chaudhuri*, 38 Cal. 394: 13 C. L. J. 221, but we are not prepared to adopt those definitions as exhaustive. We can quite understand that a person specially a person in the financial position of the debtor, may not have any permanent or continuous residence. It is, in our opinion, sufficient that he has remained within the limits of the District though he may have occasionally gone outside the District and returned to it."

Carries on Business.—*See Notes* under Sec. 66. In Sec. 20 (a) C. P. C. "carrying on business" is used as distinct from "personally working"; it does not necessarily involve personal presence or personal effort and a man may carry on a business in a place, *e.g.*, through an agency or through a manager or by his servants, without ever having gone there. It means having an interest in a business at that place, a voice in what is done, a share in the gain or loss, and some control, if not over the actual method of working, at any rate upon the existence of business. *Kripa Ram v. Mangal Sen*, 19 A. L. J. 696: 65 I. C. 93: 3 U. P. R. All. 18: 1922 A. I. R. All. 337. The word "personally" in Sec. 11 qualifies the words "works for gain" and not the words "carries on business," nor do the words "carries on business" connote the idea that the business should be carried on personally. It is not necessary, therefore, that to give the Insolvency Court jurisdiction over a person, the latter should be personally carrying on business within the jurisdiction of the Court. *Chetandas Mohandas v. Ralli Bros.*, 83 I. C. 135: 1925 A. I. R. (S.) 153.

"Where he is in custody."—The word "or" in the section is used in the sense of giving an alternative choice. So where a debtor has been arrested or imprisoned, he is not limited in the presentation of his insolvency petition^o to the Court having jurisdiction in the local area where he is in custody, *Ghansamdas v. Bishindein* 5 S. L. R. 259: 15 Ind. Cas. 830.

Proviso: In *Madho Pershad v. A. L. Walton, supra*, it has been held that "Sec. 47 (1) now Sec. 5 provides that subject to the provisions of the Act the Court in regard to proceedings under the Act shall have the same powers and follow the same procedure as it has and follows in the exercise of original civil jurisdiction. But this section does not directly or by implication render Sec. 21 C. P. C. 1908 applicable to proceedings under the Provincial Insolvency Act. Consequently the doctrine that no objection as to the place of suing shall be allowed by any appellate Court unless such objection was taken in the Court of the first instance at the earliest possible opportunity, and unless there has been a consequent failure of justice, cannot be applied to these proceedings."

The above proviso has been found necessary to be incorporated to obviate the difficulties created by the decision in the above case. And Sec. 21 of the C. P. C. 1908 has been made applicable to the proceedings under the Provincial Insolvency Act.

12. [6(1)] Every insolvency petition shall be in writing and shall be signed and verified in the manner prescribed by the *Code of Civil Procedure, 1908*, for signing any verifying plaints.

NOTES.

Review.—This is Section 6 (1) of Act III of 1907 with the omission of the portion "and the procedure laid down in the said Code with respect to the admission of plaints shall, so far as it is applicable, be followed in the case of such petitions."

It is a condition precedent that the application for insolvency either by the debtor or by the creditor shall be signed and verified, either in the ordinary form of verification or by affidavit, and the Court must have some statement on oath before it can be set in motion. For particulars for signature, verification &c., *vide* Order VI. C. P. C. Where the debtor is a 'firm,' the application for insolvency must be in the name of the firm, and *must* be signed in the manner laid down in the New Rules 19, 22 and 24 framed by the High Court under Sec. 79 of the present Act. *Satis Chandra Addy v. Firm of Rajnarain Pakhira and Rasiklal Pakhira*, 72 Ind. Cas. 60.

13, [11] (1) Every insolvency petition presented by a debtor shall contain the following particulars, namely :—

Contents of petitions.

- (a) a statement that the debtor is unable to pay his debts;
- (b) the place where he ordinarily resides or carries on business or personally works for gain, or, if, he has been arrested or imprisoned, the place where he is in custody;
- (c) the Court (if any) by whose order he has been arrested or imprisoned, or by which an order has been made for the attachment of his property, together with particulars of the decree in respect of which any such order has been made;
- (d) the amount and particulars of all pecuniary claims against him, together with the names and residence of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by him;
- (e) the amount and particulars of all his property, together with—
 - (i) a specification of value of all such property not consisting of money;
 - (ii) the place or places at which any such property is to be found; and
 - (iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the *Code of Civil Procedure, 1908*, or by any other enactment for

the time being in force from liability to attachment and sale in execution of a decree;

(f) *a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)—*

(i) *if such petition has been dismissed, the reasons for such dismissal, or*

(ii) *if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and, if so, the grounds therefor.*

(2) Every insolvency petition presented by a creditor or creditors shall set forth the particulars regarding the debtor specified in clause (b) of sub-section (1), and shall also specify—

(a) *the act of insolvency committed by such debtor, together with the date of its commission; and*

(b) *the amount and particulars of his or their pecuniary claim or claims against such debtor.*

NOTES.

Review.—This is section 11 of Act III of 1907 with the addition of clause (f) with sub-clause (i) & (ii), and is mainly based upon section 8 (2) of the Bankruptcy Act, 1883.

The section is divided into 2 sub-sections (1) & (2)—sub-section (1) deals with the contents of the petition presented by a debtor, clauses (a) & (b) enumerating the particulars of the contents. Sub-section (2) deals with the contents of a petition presented by a creditor.

The question is, if a debtor in his petition in insolvency, has misstated the amount and the particulars of all the pecuniary claims against him and has not given a true account of the value and particulars of all his property in his petition as required by Sec. 11 (1), now Sec. 13 (1) cl. (d) & (e), would that disentitle him to an order of adjudication? In *Karim Baksh v. Mahabir Bania*, 12 Ind. Cas. 685, the Court held, that would *not* disentitle him to an order for adjudication. In *Muni Lal v. Bhagwan Das*, 26 Ind. Cas. 24, the application in fact mentioned some bogus debts in the schedule of liabilities given with the application. Held, if he has been guilty of bad faith in drawing up the schedule he can be suitably dealt with at a later stage. That is also the view expressed in *Jeer v. Rungaswami*, 36 Mad. 402. "Before passing an order of adjudication it is not for a Court to decide whether the debts stated in the petition for insolvency are real, whether the petitioner has not concealed any property of his from his list of assets or whether he is unable to pay his debts and similar questions. All these are properly subjects that ought to be enquired into before giving discharge. The only things that are necessary to be decided before adjudication are whether the creditor or the debtor is entitled to present the petition, whether the required notices have been served and whether the debtor has committed the alleged "acts of insolvency." See also *Ponnuswami Chetty v. Narayanswami Chetty*, 21 Ind. Cas. 293, *Koppuravvari v. The Guntur Cotton Mills, Ltd.*, 14 M. L. T. 587; M. W. N. (1914) 153.

Amendment.—The court may amend a petition for insolvency upon such terms, if any, as it thinks fit to impose. See Sec. 8 Bankruptcy Act, 1883 & Order VI, r. 17, C. P. C. 1908. As a general rule, an amendment of a bankruptcy notice will not be allowed except in the case of merely formal defects, *Ex parte Dan Rylands Ltd. Re. Collier*, 1891 8 Morr 80. The Court will not amend a petition by adding other creditors as petitioners after 3 months from the act of bankruptcy upon which the petition is founded, *Re. Maund. Ex parte Maund*, 1895, 1 Q. B. 194. Where a petitioning creditor had inadvertently omitted to mention in his petition a security which he, in fact, held, but which had been given many years ago in respect of another matter, and was admittedly valueless, held, that a receiving order made upon the petition was not invalidated by the omission, in as much as, *the Court had power to amend the petition even after the making of the receiving order.* In *Re. a Debtor*, 1922

Provident Fund.—Under Sec. 4 of the Provident Funds Act as amended by sec. 2 of the Provident Fund (Amendment) Act, 1903, a Railway Provident Fund is not liable to attachment at the instance of the creditor of the subscriber. *C. D. M. Hindley v. Joy Narain Marwari*, 24 C. W. N. 288. Hence the Provident Fund of a debtor is not liable to attachment by an order of the Insolvency Court under this section, nor capable of being taken possession by the Receiver. A deposit in a Provident Fund which, so long as the subscriber was in service was a compulsory deposit within the meaning of Sec. 2 (4) of the Provident Fund Act, IX of 1897, and not attachable by a creditor the moment the subscriber retired. *Devi Prasad v. Secretary of State*, 21 A. L. J. 454. So also in *Secretary of State v. Rajkumar Mukherjee*, 50 Cal. 347, it was held that the deposits of a Railway servant in the State Railway's Provident Institution are compulsory deposits, and therefore they are not attachable while he was in service, or on his death, or on his retirement under Sec. 4 of the Provident Funds Act. Similarly the subsequent accretions, such as contributions, interest or increment to the original deposits are not attachable.

Clause (c).—It was not the intention of the Legislature that a judgment-debtor who had been once arrested or against whose property an order of attachment has once been made could some years afterwards come into court and apply to it to declare him an insolvent on the strength of a long-dropt proceeding by arrest or attachment. He is entitled to present a petition for insolvency only when the order of attachment or arrest against the debtor is actually pending at the time when he makes the application; *Jumai v. Muhammad Azim Ali*, 25 All 204: 23 A. W. N. 11.

Clause (d).—A debtor who omitted from the list of pecuniary claims against him those of foreigners and others not residing in British India would incur great risk of having his application rejected as sec. 11 (d) requires the debtor to set forth the amount and particulars of all pecuniary claims against him; *Main Goman Singh v. Gonesh Lal*, 35 P. R. 1888.

Clause (e).—For enumeration of what constitutes the property of the insolvent, *vide notes under Sec. 2 (d) and notes under Sec. 28.*

Properties Exempted from attachment under C. P. C.—*Vide Sec. 60. C. P. C. V. of 1908.*

Properties Exempted by any other enactment.—Under Sec. 4 & 11 of the *Pensions Acts*, XXIII of 1871, “no pensions, granted or continued by Government on political considerations or on account of past services or present infirmities or as a compassionate allowance, and no money due on account of any such pension or allowance shall be liable to seizure, attachment or sequestration by process of any Court in British India at the instance of a creditor for any demand against the pensioner or in satisfaction of a decree or order of any such court.” Under Sec. 4 of the *Provident Funds Act*, IX of 1897, as amended by Sec. 2 of Act IV of 1903, “compulsory deposits in any Government or Railway Provident shall not be liable to any attachment under any decree or order of a court of justice in respect of a debt or liability incurred by a subscriber to or depositor in, any such fund, and neither the Official Assignee nor a Receiver appointed under Ch. XX of the Code of Civil Procedure (now Act V of 1908) shall be entitled to, or have any claim on such compulsory deposit.” See also *C. D. M. Hindley v. Joy Narain Marwari*, 24 C. W. N. 288. Under Sec. 81 of the *Indian Marine Act*, XIV of 1887, “the clothes, equipment or arms of a person subject to this Act shall not be seized, nor shall the pay and allowances or any part thereof of any person below the position of gazetted officer be attached in execution of any decree or order enforceable against him by any court of civil judicature.” Under the *C. P. Tenancy Act*, agricultural holdings are exempt from attachment, *Sitaram v. Shaikh Sardar*, 13 N. L. R. 215. Under the *Agra Tenancy Act* agricultural holdings and dwelling house of a raiyat are exempt from attachment, *Sugar Mal v. Rao Girraj Singh*, 39 All 120: 14 A. L. J. 1031: 38 Ind. Cas. 171. In Bengal, before ordering sale of occupancy holdings of an insolvent the Court should have come to a decision that the holdings are transferrable without the consent of the landlord, *Arman Sardar v. Satkhira Jt. Stock Co.*, 18 C. L. J. 564. Under Sec. 16 of *Bundelkhand Alienation of Land Act*, II of 1903 (Local) no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any Civil or Revenue Court made after the commencement of the Act, *Hanuman Prosad Narain Singh v. Harakh Narain*, 42 All 142: 58 Ind. Cas. 551.

Clause (f).—This clause is new, and has been found necessary in view of the new provisions introduced in sec. 10 (2) & 25 (2). The old Act III of 1907 did not contain any provision like this and in *Muhammad Shir v. Mahabir Prasad*, 15 A. L. J. 572: 40 Ind. Cas.

445, which was decided under the old Act, the petition was dismissed simply because the applicant did not disclose the fact that he had once before applied to be declared an insolvent, and that the application had been dismissed. The High Court held that that was not a sufficient reason within the meaning of Sec. 15, now Sec. 25 of the Act. The act of filing an application by a debtor was in itself an act of insolvency. It had also been held under the old Act that where a previous application to be declared an insolvent was dismissed for non-production of evidence, a second application was not barred by the principle of *res judicata*. *Salig Singh v. Ram Kishan*, 10 A. L. J. 51. In *Shauik Abdul Aziz v. Lalit Chandra*, 22 C. W. N. 171 (notes) the appellant applied before the District Judge for an adjudication of insolvency. His application was dismissed "for not taking necessary steps for supplying creditors with copies." He thereupon applied for restoration of his case which having been dismissed he made a fresh petition for insolvency. This second petition had also been rejected, the District Judge holding "that as the appellant's application was dismissed under Or. IX r. 4 C. P. C. it was open to him either to bring a fresh application or to apply for an order to have the dismissal set aside. He chose the second remedy and applied to have the dismissal set aside, which was refused. *It was not open to him to make a fresh application for insolvency on the same facts.* He could not avail himself of both the remedies." Held, in appeal, by the High Court that "there being no specific provision prohibiting the present application, the application was maintainable. The adoption of a second remedy did not deprive the applicant of his right to file a fresh application for adjudication on the same facts, which right remained with him till a decision on the matter on the merits." *Abdul Aziz v. Habib Mistri* 49 I. C. 259.

Fresh Application on the same Facts.—Now the question arises whether a fresh application for adjudication on the same facts by a debtor lies, if his previous application has been rejected on the merits, i.e., either on the ground that he could not satisfy the Court that he had no means to pay or that he had no right to present the petition. It should be noted that if a petition for adjudication has been presented not *bona fide* with a view to obtain an order of adjudication but for an inequitable or collateral purpose the Court might dismiss the application as an abuse of the process of the Court. *Ex parte King*, 3 Ch. D. 461, (1876) *Ex part Griffin*, 12 Ch. D. 480. (1879) *Ex parte Tynte* 15 Ch. D. 125 (1880), *In Re. Betts*, (1901) 2

K. B. 39, In *Re. Sabhapathi*, 21 Bom. 2971 *Sheikh Samiruddin v. Kadumoyee*, 15 C. W. N. 244: 12 C. L. J. 445. In *Malchand v. Gopal Chandra Ghoshal*, 21 C. W. N. 298, an application for adjudication was made on the same materials as the application for the previous adjudication order. The debts were the same; the creditors were the same; was it an abuse of the process of the Court under these circumstances? It was contended that a debtor if he comes to Court and shows that he is unable to pay his debts is entitled for his protection to get adjudication for insolvency. Under the law of England it is well settled that when the presentation of a petition amounts to an abuse of the process of the Court, the Court may decline to make any order on it, or may rescind the receiving order made on the petition, and this principle has been followed by all the Indian High Courts. Mukherji J. held "In my opinion, there is no escape from the conclusion that the application was an abuse of the process of the Court. It is admitted that there has been no change whatever in the circumstances of the petitioners. In fact, the allegations whereon the previous application was based were absolutely identical with those mentioned in the last application. If an application of this character were entertained, the result would be inevitable that an insolvent would be encouraged to make an application for insolvency to obtain an adjudication order, to take no substantial steps thereafter, or to abandon the proceedings and, when pursued by his creditors again, to seek relief in Insolvency Court whenever convenient to him." In *Re. Ballav Chand Serowgee*, 27 C. W. N. 739, decided under the Presidency Towns Insolvency Act, an insolvent was adjudicated on his own petition but having failed to apply for his discharge within the time provided by the Act his adjudication was annulled. Subsequently on his own application, on the same facts and materials, his second adjudication took place, and a creditor applied to annul the adjudication. Held, following *Malchand v. Gopal Chandra Ghoshal*, *supra*, that the presentation of the second insolvency petition by the debtor was an abuse of the process of the Court, and the second adjudication order founded upon it must be annulled.

Therefore Sec. 13 (f) contemplates a fresh application for adjudication only on a new cause of action, i.e. after discharge on his first adjudication, or when his previous application had been rejected not on the merits.

14. [7] No petition, whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the Court.

Withdrawal of petitions.

NOTES.

Review.—This is sec. 7 of Act III of 1907, and corresponds to Ss. 7 (7) and 8 (2) of the Bankruptcy Act, 1883.

This section also provides a check upon the abuse of the process of the Court. It would appear that a petitioning creditor often would resort to the Insolvency Court not with the *bona fide* intention of getting his debtor's estate administered under the insolvency laws but for the collateral purpose of bringing pressure to bear upon the debtor to pay off his debts and to settle his claim with the insolvent, and, if successful, to apply to the Court for permission to withdraw his petition or leave it to be dismissed for default. In such circumstances the Court would refuse leave and would pass the order of adjudication, and it has been held that it is an abuse of the process of the Court and should not be countenanced in any way. *Gadigi Mudappa v. Parameswara Bhat*, 1925 A. I. R. (Mad.) 242: 85 Ind. Cas. 303. If the petitioning creditor after having settled his claim with the insolvent out of Court does not press the prosecution of his application the act of bankruptcy committed by the debtor would be available to any other creditor to be substituted in the place of the petitioning creditor to support his petition. *Robson*.

Notice.—No petition for insolvency is allowed to be withdrawn without notice to all the parties concerned, and apart from Sec. 151 C. P. C. the Court has inherent power to set aside an *ex parte* order obtained by fraud and misrepresentation and to rectify the mistake inadvertently made; *Raja Debi Baksh Sing v. Habib Shah*, 17 C. W. N. 892. In *The Application of Messrs. Fleming Shah & Co.*, 35 Ind. Cas. 539, Pratts C. J. held "that it may be that under the English Bankruptcy Act leave to withdraw may be given after receiving order has been made; but even if that were so, that is not an analogous case, for a receiving order does not make the debtor a bankrupt or deprive him of legal title to his property. Here the withdrawal of the petition would be of no avail unless it implies an annulment of the adjudication. The Act specifies in sec. 42 (now Ss. 35 & 36) the conditions on which the Court may annul an adjudication

and it is impossible that it was intended that the same result could be produced by the simple device of withdrawing the original petition. The court may grant leave for the withdrawal of a creditor's petition after being informed of the facts and terms of withdrawal, *Re. Bebro*, 1900 2 Q. B. 316. The section refers to withdrawal before making of the adjudication order. Once the adjudication is made, the Court has no power to give leave to withdraw the insolvency petition."

An arrangement come to by a debtor with his creditors will not justify a Court in allowing an insolvent to withdraw his petition. If all the parties concerned desire to take the matter out of the hands of the Court the petition may be dismissed, *In Re. Pyari Chand* 6 B. L. R. 558. Any private arrangement with creditors and payment in accordance therewith cannot be recognised in insolvency proceedings, *Beharilal Sikdar v. Harsookdas Chakmall*, 25 C. W. N. 137: 61 Ind. Cas. 904.

"A petitioning creditor who gets his debtor adjudicated is not entitled to settle his claims out of Court in consideration of his withdrawing from further proceedings in the matter." *In Re. Shiv Lal Rathi*, 19 Bom. L. R. 365: 40 Ind. Cas. 207.

15. [8] Where two or more insolvency petitions are presented against the same debtor, or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings or any of them, on such terms as the Court thinks fit.

Consolidation of petitions.

NOTES.

Review.—This is sec. 8 of Act III of 1907 and corresponds to ss. 97 and 100 of the Bankruptcy Act, 1883.

The power of consolidating the proceedings is given to the courts so as to minimise expenses, save public time and avoid multiplicity of proceedings, and for their speedy and effective determination. The section involves both the question of Transfer and Consolidation. Sec. 24 of the C. P. C. deals with the provisions of transfer and withdrawal of any suit, appeal or other proceeding to and from other courts. In *Re. Stick, Ex parte Martin*, 1886 3 Morr. 78, where a petition had been presented in Swansea, the debtor's place of business, and in London, the proceedings in the London petition were

transferred to Swansca. See *Re. Linton* 1892 8 T. L. R. 219. Where a member of partnership dies insolvent and an order is made under Sec. 125 of the Bankruptcy Act, 1883, for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the proceedings in the estate can be consolidated, *Re C. Greaves* *Re. W. H. Greaves, Ex parte Official Receiver*, 1904 2 K. B. 493.

An application to transfer a petition against one partner from the District Court to the High Court where the petition is pending against the other partner should be made in the High Court. *Vide* Sec. 24 C. P. C.

Petitions by creditors.—It should be noted that this section provides for the consolidation of several petitions by creditors only against the same debtor or against joint-debtors, either in the same Court or in Courts subordinate to the District Court.

Though it was formerly held that “a declaration of insolvency could not be asked for in one petition against several debtors, and there was no provision in the Provincial Insolvency Act for proceeding against two or more persons being partners in the name of the firm,” *Kalicharan Saha v. Harimohan Basak*, 24 C. W. N. 461: 31 C. L. J. 461, it has since been held in *Bolisetti v. Kolli Kotayya*, 44 Mad. 810, that in cases, where the debtors are the members of a joint Hindu family, a single application will lie. This view has now been adopted by the Calcutta High Court in the New Rules 19-27 recently framed under Sec. 79 of the New Act, V. of 1920 and a single petition by and against joint debtors is maintainable in law. For Rules *Vide* Appendices.

Separate petitions in different Courts of independent jurisdiction.—It has been seen that Section 15 has reference only to petitions presented by creditors. The section does not provide for the consolidation of petitions presented either by different debtors in different Courts or by debtors in one Court and creditors in another Court. No difficulty arises for consolidation if some of the petitions are filed in the District Court and some are in Courts subordinate to the District Court, because under Sec. 24 C. P. C. the District Court may at any stage transfer or withdraw any suit, appeal or other proceeding pending in Courts subordinate thereto. But the difficulty arises where the creditors apply for adjudicating the debtor an insolvent in a different District Court or High Court and the debtor applies in another

District Court or High Court in British India. In such cases the difficulty is solved by the provisions in Sec. 36, *vide infra*.

16. [9] Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor.

NOTES.

Review.—This is sec. 9 of Act. III of 1907, and sec. 107 of the Bankruptcy Act, 1889. The 'petitioner' means the petitioning creditor.

It is intended to serve as a check on the fraud of either the debtor or the creditor who has presented the application for insolvency. It is not difficult to imagine the case of a creditor, who has presented the application for insolvency against his debtor, having entered into a private treaty with his debtor, not prosecuting his application with diligence and allowing it to be struck off for default. This may no doubt enure to the benefit of the creditor and to the advantage of the debtor in as much as it saves his voluntary and gratuitous transfers within 2 years from the date of the presentation of his application, and transfers by way of fraudulent preference within 3 months from the date thereof. But it will not be to the advantage of the general body of creditors. In case the petitioning debtor or creditor does not with due diligence proceed in his petition so as to bring the estate of the debtor to be administered according to the bankruptcy law, any other creditor to whom the debtor is indebted to the amount of Rs. 500/- may be substituted as petitioner and the proceedings may be proceeded with. The creditor presenting the petition is considered to prosecute the petition not only for his own benefit but also for the benefit of the creditors generally. *Ex parte Maugham* 21 Q. B. 21. See also *Dasugopal v. Bhanji* 26 Bom. 171.

17 [10] If a debtor by or against whom an insolvency petition has been presented dies, the proceedings on death of debtor. in the matter shall, unless the

Court otherwise orders, be continued *so far as may be necessary for the realisation and distribution of the property of the debtor.*

NOTES.

Review.—This is sec. 108 of the Bankruptcy Act, and sec. 10 of Act III of 1907 with the substitution of the clause “so far as may be necessary for the realisation and distribution of the property of the debtor” in place of “if he were alive.” This amendment was introduced to make it clear that “the object of continuing proceedings on the death of the debtor is for the purpose only of realising and distributing his property.”—*Notes on Clauses.*

In *Re. Walker* 1863 3 Morr. 69 it was held that “if a debtor dies after presenting his petition the proceedings may be continued against his estate.” Proceedings in insolvency do not abate by reason of the death of the debtor, and the Court has power to bring on to the record of the insolvency proceedings the names of the legal representatives of the deceased insolvent. *Ras Jus v. Katha Sing*, 59 Ind. Cas. 51: 9 P. L. R. 192: 14 P. W. R. 1921. See also *Fakir Chand v. Motichand*, 7 Bom. 438; In *Re. Sitaram* 10 Bom. H. C. 58; *Paltu v. Janki Prasad*, 6 B. L. R. 119; *The Administrator General of Madras v. Official Assignee*, 3 Ind. Cas. 163: 6 M. L. J. 188. “When on the death of the insolvent after the order of adjudication the proceedings in insolvency are directed to be continued under Sec. 10, now Sec. 17, at the instance of the representatives of the deceased insolvent, on general principles as well as on the express provisions contained in Sec. 24 (3), now Sec. 33, read with the further provisions contained in Sec. 47, now Sec. 5 of the Act, it is incumbent upon the Court to permit the representatives of the insolvent to be present so as to give them an opportunity of cross-examining the claimants-creditors and their witnesses and to offer rebutting evidence in support of their plea that their claims have either been satisfied or are barred,” *Sripat Singh v. Maharaja Sir Prodyot Kumar Tagore*, 57 Ind. Cas. 810.

Where property has vested in a Receiver after an order of adjudication the death of the insolvent does not divest the Receiver of the property and his son is not entitled to take it by survivorship. The death of a debtor does not put an end to an insolvency proceeding on an application by him. *Lachman Das v. Jai Singh*, 79 I. C. 458.

18 [6 (1)] The procedure laid down in the Procedure for admission of petition. *ad- Code of Civil Procedure, 1908.* with respect to the admission of complaints, *shall* so far as it is applicable, be followed in the case of *insolvency* petitions.

NOTES.

Review.—This is the latter portion of Sec. 6 (1) of Act III of 1907.

The procedure laid down in the C. P. C. 1908, with respect to admission of complaints are to be found in Orders VI & VII and in Order IV r. 1 & 2. Thus the procedure to be followed in an admission of *insolvency* petitions is (1) presentation of the application and (2) that the application conforms to Ss. 9, 10, 11 and 12 and (3) that the application conforms to Orders VI & VII of the C. P. C. V. of 1908.

19. [12] Where an *insolvency* petition is admitted, the Court shall make an order fixing a date for hearing the petition.

(2) Notice of the order under sub-section (1) shall be given to creditors in such manner as may be prescribed.

(3) Where the debtor is not the petitioner, notice of the order under sub-section (1) shall be served on him in the manner provided for the service of summons.

NOTES.

Review.—This is sec. 12 of Act III of 1907.

Notice.—Service of notice is imperative and want of notice vitiates the order; *Komara Sami v. Govind*, 11 Mad. 136. And an *ex parte* order of adjudication without service of notice is liable to be set aside, *Mool Chand v. Sarjoog Pershad*, 12 C. W. N. 273; 7 C. L. J. 268.

Notice to a Creditor.—The notice may be served either by registered post or by personal service. Personal service of notice or delivery of the notice to an agent would be good service, or delivery to the principal, though in fact, the notice was destroyed by

the agent and never seen or heard of by the principal. It was an entire mistake to suppose that the addressee must sign the receipt for the registered letter himself or that he cannot do so by the hand of another person or that if another does sign it on the addressee's behalf the presumption is that it never was delivered to the addressee himself, mediately or immediately. In *Harihar Banerji v. Ramshashi Rai*, 23 C. W. N. 77: 29 C. L. J. 117, the Privy Council held that "if a letter properly directed containing a notice is proved to have been put into the Post Office it is presumed that the letter reached its destination according to the regular course of business and was received by the person to whom it was addressed. That presumption would apply the greater force to registered letters." In *Girish Chandra Ghose v. Kishori Mohan Das* 23 C. W. N. 319, a notice was given by registered post, but the letter containing the notice was returned by the Post Office the addressee having refused to accept it. Held that "under Sec. 114 of the Evidence Act the Court was entitled to presume that the letter containing the notice reached the defendant and the fact that the letter was returned by the Post Office as not accepted by the addressee did not destroy the presumption."

Private notice to a creditor, in the absence of a general notice, does not validate an adjudication, *Nachlauppa Chetty v. Thangarahi Chetty*, 34 Ind. Cas. 696. The only things that are necessary to be decided by a court before adjudication are whether the creditor or the debtor is entitled to present the petition, whether the required notices have been served and whether the debtor has committed the alleged acts of insolvency, *Jeer v. Rangaswami*, 36 Mad. 402.

Notice to a debtor on creditor's application.—The notice must be served upon the debtor in the manner prescribed in the C. P. C. for the service of summons in Order V. r. 12. A creditor's petition must be personally served by delivery to the debtor of a sealed copy of the filed petition, *vide* sec. 7 of the Bankruptcy Act, 1883. It must be served by an officer or bailiff of the Court or his solicitor or by some person in their employ, *Re Blackman, Ex parte Branfill*, 1892, 9 Morr, 157. In *Nathmull v. Ganeshmull Jivanmull*, 34 C. L. J. 349 it was held that the omission to serve the notice as contemplated by sub-section (3) is not a formal defect or irregularity. "This notice is the first notice, which the Legislature contemplated, was to be received by the alleged insolvent before the proceedings culminated in an adjudication order against him. It is of fundamental importance

that an order of this description should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served upon him. The rule contemplates a personal service on the alleged insolvent and substituted service is permitted only if personal service cannot be effected. If a personal service cannot be effected the Court may extend the time for hearing the petition or if the Court is satisfied by affidavit or otherwise that the debtor is keeping out of the way to avoid such service or service of any other legal process or that for any other cause prompt personal service cannot be effected it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or his last-known residence or place or business, or by registered letter or in such other manner as the Court may direct, and such petition shall then be deemed to have been duly served on the debtor."

20. [New] *The Court when making an order admitting the petition may, and where the debtor is the petitioner ordinarily shall, appoint an interim receiver of the property of the debtor or of any part thereof, and may direct him to take immediate possession thereof or of any part thereof, and the interim receiver shall thereupon have such of the powers conferable on a receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct. If an interim receiver is not so appointed, the Court may make such appointment at any subsequent time before adjudication, and the provisions of this sub-section shall apply accordingly.*

NOTES.

Review.—This section is new, and it makes a departure from the provisions of Act III of 1907 under which a receiving order (s. 18) ordinarily used to follow and not to precede an adjudication order; whereas under this new section a receiving or vesting order shall be passed, as a matter of course on the presentation of an application for insolvency by a debtor; and in the case of an application for insolvency by a creditor it is left to the discretion of the Court.

"Section 13 (2) of Act III of 1907, empowered the Court to appoint an interim receiver between the admission of petition and

the order of adjudication, but the Act was silent as to the powers of an interim Receiver. It was considered desirable that an interim receiver should normally be appointed when the petition is admitted and should be armed with such of the powers conferrable on a receiver under the Code of Civil Procedure as the Court may direct (*Cf.* Sec. 16 of the Presidency Towns Insolvency Act).”—*Notes on Clauses.*

May.—The discretion to appoint an *interim* receiver in the case of an application by a creditor must be a judicious discretion and not arbitrary, and when it appears to the Court to be just and convenient (Order 40 r. 1) or where it is proved by affidavit or otherwise that any property of the debtor is in danger of being wasted, damaged or alienated by the debtor or wrongfully sold in execution of a decree or that the debtor intends to remove or dispose of his property with a view to defraud his creditors (Or. 39 r. 1) or where the Court is satisfied by affidavit or otherwise that the debtor with intent to delay or defeat his creditors is about to dispose of the whole or any part of his property or is about to remove the whole or part of his property from the local limits of its jurisdiction (Or. 38 r. 1 & 5) the Court is bound to order the appointment of an *interim receiver* immediately on the presentation of the application by a creditor.

The law is now brought in a line with the English Law and the Presidency Towns Insolvency Act. According to Sec. 8 (1) Bankruptcy Act in the case of a debtor's petition if it is in due form and complies with the prescribed conditions a receiving order is made as a matter of course except where the petition is an abuse of the process of the Court.

The discretion given to the Court under this section to appoint an *interim* receiver should ordinarily be exercised only in cases where the property of the insolvent has to be preserved from destruction and disappearance and not merely for protecting the properties from sale in execution by other Courts, *Bashyam Reddi v. Somasundaram*, 32 Ind. Cas. 897.

Shall.—The Court is not obliged to make a receiving order in spite of the imperative word “shall” used in the section, *Re Bond*, 1888 21 Q. B. D. 17; *Re. Bettles, Ex parte Official Receiver*, 1901, 2 K. B. 93. On the hearing of a petition by a creditor the Court may either dismiss the petition or make a receiving order or dismiss the petition as against one or more respondents and make a receiving order against others Sec. 111 Bankruptcy Act.

Interim Receivers.—At any time after the presentation of a bankruptcy petition the Court may appoint the Official Receiver to be interim receiver of the property of the debtor or any part thereof and direct him to take immediate possession. In *Madhu Sardar v. Ishitish Chandru Banerjee*, 42, Cal. 289, it has been held that “an order for the appointment of an interim receiver of the property of the debtor is made for the protection of the estate of the debtor for the general body of creditors. At the stage when the ad-interim receiver is appointed no question arises as to the distribution of the property of the debtor amongst the creditors or as to preferences amongst them.”

His Status.—“A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of Sec. 2 cl. 17 of the C. P. C., and before an action can be brought against him notice must be served upon him in conformity with the requirements of Section 80 of the Code,” *Anna Laticia De Silva v. Govind Balvant Pareshare*, 58 Ind. Cas. 411.

Interim Receiver and Receiver after adjudication.—“Where an *ad interim* Receiver has been appointed in insolvency proceedings the Receiver appointed after adjudication does not stand in the shoes of the interim Receiver. He stands on a very much higher footing. The property of the judgment debtor vests in him, he holds it for the benefit of the whole body of the creditors and he has special rights conferred and special duties imposed upon him by statute,” *Ramsaran Mandar v. Sira Prasad*, 58 Ind. Cas. 783.

21 [13] At the time of making *an order admitting the petition* or at any subsequent time before adjudication the Court may either of its own motion or on the application of any creditor make one or more of the following orders, namely :—

Interim proceedings
against debtor.

- (1) order the debtor to give reasonable security for his appearance until final orders are made upon the petition; and direct that, in default of giving such security, he shall be detained in the civil prison;
- (2) order the attachment by actual seizure of the whole or any part of the property

in the possession or under the control of the debtor, other than such particulars (not being his books of account) as are exempted by the *Code of Civil Procedure, 1908*, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree;

- (3) order a warrant to issue with or without bail for the arrest of the debtor, and direct either that he be detained in the civil prison until the disposal of the petition, or that he be released on such terms as to security as may be reasonable and necessary:

Provided that an order under clause (2) or clause (3) shall not be made unless the Court is satisfied that the debtor with intent to defeat or delay his creditors or to avoid any process of the Court,—

- (i) has absconded or has departed from the local limits of the jurisdiction of the Court, or is about to abscond or to depart from such limits, or is remaining outside them, or

- (ii) has failed to disclose or has concealed, destroyed, transferred or removed from such limits, or is about to conceal, destroy, transfer or remove from such limits, any documents likely to be of use to his creditors in the course of the hearing, or any part of his property other than such particulars as aforesaid.

NOTES.

Review.—This is mainly Section 13 of Act III of 1907, subject only to the exclusion of clause (2) which provided for the appointment of an interim receiver of the property or any part thereof which has been provided for in the preceding new Section 20.

This section applies to applications presented by the creditor for the adjudication of the debtor, in which case for the safety of the creditors in general any one or all of the orders mentioned in this section may be passed by the Court either on the application of the creditor or of its own motion.

Clause (1) Security.—Where security for appearance of the debtor was given, the insolvency petition dismissed, and the surety failed to produce the debtor when called upon, held in *Basanti Lal v. Cheddi Singh*, 39 Cal. 1048: 16 C. W. N. 664, that the security money cannot be forfeited to Government but should be paid to the decreeholder. It is for the Judge to determine whether the security is sufficient, *In the matter of Bhubon Mohon Bose*, 15 W. R. 571. The obligation of the surety is discharged on the debtor's death *Krishnan Naiyar v. Itinann Naiyar*, 24 Mad. 637, *Nabin v. Mritunjay*, 40 Cal. 50: 17 C. W. N. 1241.

Clause (1) of this section should be read with Section 55 (4) of the C. P. Code, 1908. The assignee of the security bond given to a District Judge for the production of an insolvent when called upon to appear is entitled to make an action upon that bond. *Gopinath Chaudhuri v. Binodilal Rai Chaudhuri*, 31 Cal. 162.

Remedy against the surety.—Under the old Civil Procedure Code, Section 336, a covenant by a surety was enforceable by an action within 3 years from the date of his failure to produce the insolvent when required by the Court. *Mir Ansar Ali v. Guru Charan*, 16 All 37. But under Section 145 of the New C. P. C. 1908, no suit is necessary, the covenant may be enforced against him in the manner provided for the execution of decrees.

Clause (2).—In *Hasmat Bibee v. Bhagwan Das* 36 All. 65, it was held that an order of attachment of the property of the insolvent made before the order of adjudication must be made according to the provisions of the Civil Procedure Code, 1908, Orders 21 & 38. The Courts in India as in England may cause a debtor to be arrested and any books, papers, money and goods in his possession to be seized if there is probable reason for believing that he has absconded or is about to abscond with a view to avoiding payment of the debt in respect of which the bankruptcy notice was issued or if after presentation of a petition by or against him there is probable cause for believing that he is about to remove to prevent or delay the possession being taken by the Official Receiver or that he has

-concealed or is about to conceal or destroy any of his goods or books of account, documents, writings which might be of use to his creditors in the course of his bankruptcy; or if after service of a petition on him he removes any goods in his possession without the leave of the Receiver. See Section 25 (1) (a), (b), (c) of the Bankruptcy Act, 1883.

Books of Account.—Books of account are not attachable under Section 60, C. P. C. 1908, but under the Insolvency Act books of accounts have been made attachable and they have been exempted from the particulars mentioned in Section 60, C. P. C., 1908.

Provident Fund.—Under Section 4 of the Provident Funds (Amendment) Act, 1903, a Railway Provident Fund is not liable to attachment at the instance of a creditor of the subscriber, *C. D. M. Hindley v. Joy Narain Marwari*, 24 C. W. N. 288. Hence the Provident Fund of a debtor is not liable to attachment by an order of the Insolvency Court under this section, nor capable of being taken possession of by the Receiver. By virtue of Section 4 of the Provident Funds Act, IX of 1907, neither the Receiver nor the creditors of an insolvent have any right to money drawn by the insolvent from his compulsory deposit in a Railway Provident Fund, *Nagindas Bhukandas v. Ghelabhai Gulabdas*, 56 Ind. Cas. 450. See also *Devi Prasad v. Secretary of State*, 21 A. L. J. 454 and *Secretary of State v. Raj Kumar Mukherji*, 50 Cal. 347. cited under Section 2, *supra*.

Mitakshara Joint Family was previously held **Property**.—Though it in *Anant Singh v. Kalka Singh*, 5 O. L. J. 665: 48 Ind. Cas. 526, that the share of an insolvent member in joint Hindu family property was not 'property' as defined in Sec. 2 (d) and could not be taken possession of by the Receiver, this view has now been superseded by the case of *Lal Bahadur v. Paspal Prasad*, 74 Ind. Cas. 301: 1923 A. I. R. 154 (Oudh), following *Deen Doyal v. Jugdeep Narain*, 3 Cal. 198, in which it has been held that an undivided member has an interest in ancestral property and that would amount to 'property' as defined in the Insolvency Act, and that such share in joint family would therefore vest in the Receiver. So also in *Chellaram v. Official Receiver*, 1923 A. I. R. 20 (Sindh) it has been held that under the Mitakshara Law a father has a right to dispose of his son's interest in ancestral immovable property for the payment of his own debts, and such interest is therefore 'property' within the meaning of Sec. 2 (d), and the Receiver is competent to take possession of the same.

So also in *Hurmukh Roy Munno Lal v. Radha Mohan*, 45 Ind. Cas. 981 the same view has been adopted. For fuller notes see under Sec. 2 (1)d.

Trust Property.—So a Receiver cannot be appointed to take charge of trust property, *vide* notice under Sec. 2 (d).

22. [43] (1) *The debtor shall on the making of an order admitting the petition produce all books of account, and shall at any time thereafter give such inventories of his property, and such lists of his creditors and debtors and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend at such times before the Court or receiver, execute such instruments, and generally do all such acts and things in relation to his property as may be required by the Court or receiver or as may be prescribed.*

Duties of debtors.

NOTES.

Review.—This corresponds to sec. 43 (1) of Act III 1907, with the difference that under Sec. 43 (1) of III of 1907 every debtor after the order of adjudication as a matter of course, and before the order of a adjudication if so required by the court, was bound to produce his books of account &c., but under the present section the receiving order being at once passed on the presentation of the application of the debtor, he is required to comply with the requisitions contained therein at the time of the presentation of the application. The amendment is thus explained in the *Notes on Clauses*:

“ Apparently the duties imposed on the debtor by sub-section (1) of section 43 arise as soon as the Court has made an order under Sec. 12 (1). It seems desirable to make this clear. It is difficult to see how the debtor can be made under any obligation to assist in the distribution of his property unless he is adjudged an insolvent. It is proposed therefore to amend the concluding part of sub-section (1) and to relegate to a separate sub-section the provisions which impose on the debtor the duty of aiding in the distribution of his property.”

Sir George Lowndes in introducing the Bill also observed: “ The next point I should like to refer to is the penal provisions of the

Act. Sec. 43 of the existing Act is lacking in precision, and clearly wants re-modelling. Its form has led to many difficulties and we therefore propose to re-cast it, again resorting to the model of the Presidency Towns Insolvency Act, which seems to us to be better. I should like to say in this connection that the ideal state of affairs would undoubtedly be that an Insolvency Act should itself deal only with what I may call the *special* offences under the Act, such as refusal or neglect to comply with orders of the Court or statutory requirements....."

Duties of the Debtor.—The first duty of the debtor after a receiving order has been made against him is to attend on the Official Receiver at his office immediately after the service of the order. The Official Receiver must ascertain his affairs from a personal interview with the debtor and furnish him with instructions for the preparation of his statement of affairs. The debtor must give such inventories of his properties, such list of his creditors and debtors, submit to such examination and give such information as the Official Receiver may require and also give a list of debts due to and from him and do all other things that may be required of him by the Official Receiver. (See sec. 24 (2) of the Bankruptcy Act). On the request of the Receiver he must furnish trading, and profit and loss accounts and a cash and goods account for such period not exceeding two years from the date of the receiving order as the receiver shall specify or for a longer period. *Re. Cronmire, Esparte Cronmire*, 1894, 2 Q. B. 246.

The Insolvency Court has power to direct the insolvent to appear for his examination touching his estate, effects and dealings although he resides more than two hundred miles away from the court house, *In Re. Naoraji Sarabji*, 33 Bom. 462.

Consequences of refusal or neglect to comply.—Though it is obligatory on the debtor to produce all books of account and give inventories of his properties, &c., it does not follow that non-compliance with the orders of the Court to the above effect means dismissal of his application for insolvency. An order for discovery made under Sec. 36 of the Presidency Towns Insolvency Act, may, if disobeyed, involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court as happened in the case of *Origanti v. Desikachari*, 36 M. L. J. 461. In view of such possibilities the Court should act with great caution and afford all possible facilities to the person concerned

to satisfy the Court that at the time of the order the books were either not in existence or were not under his control, *Shukhlal v. Official Assignee, Calcutta*, 34 C. L. J. 451. Though there is no express provision for the dismissal of the petition in case of intentional or unintentional noncompliance with the provisions of Sec. 22, but this gives rise to a strong presumption under Sec. 114 of the Evidence Act that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds the same and this presumption coupled with the representations of the opposing creditors is sufficient to satisfy the Court that he is not unable to pay his debts and the Court can dismiss the petition. *The Laxmi Bank Ltd., Poona v. Ramchandra Narayan Apte*, 46, Bom. 24 Bom. L. R. 292.

23. [New] (1) *At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary.*

Release of debtor.

(2) *The Court may at any time order any person who has been released under this section, to be re-arrested and recommitted to the custody from which he was released.*

(3) *At the time of making any order under this section, the Court shall record in writing its reasons therefor.*

NOTES.

Review.—This section is new, and is intended to afford relief and protection to the debtor as opposed to Sec. 21 *supra* which is intended for the benefit and protection of the interests of the creditors. The object of this section is explained by Sir George Lowndes: "We propose to abolish the automatic protection which he gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act, which provides that immediately on adjudication, the insolvent should be released from jail and make it necessary for

him to apply to the Court for protection leaving it to the discretion of the Court to grant him protection in any degree it thinks fit."

This section should be read with Sec. 55 (4) of the C. P. C. 1908. Under Sec. 10 (2) of the Bankruptcy Act, 1883, the Court has power to stay an action, execution or other legal process against the person or property of the debtor; this power may be exercised at any time after the presentation of a bankruptcy petition, i. e., before the receiving order as well as after. This protection can only be afforded in respect of a debt or liability which is provable under the Act. Thus obligation to make payment of alimony is not a debt or liability which is provable under the Act, and therefore orders for the payment of arrears of alimony may be made and enforced inspite of the receiving order, *Linton v. Linton*, 1885, 15 Q. B. D. 239, *Re. Hawkins, Ex parte Hawkins*, 1891 1 Q. B. 25.

Maintenance.—The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under Sec. 34 and not otherwise *Hira Lal v. Tulsi Ram*, 80 I. C. 946. In the matter of *Tokee Bibi v. Abdul Khan*, 5 Cal. 536, it was held that arrears of maintenance included in the schedule filed by the insolvent is a debt or liability within the Insolvent Act and an insolvent who has received a protection order is not liable to arrest or imprisonment in respect of such. *Quaere*. Whether the protection order protects the insolvent from proceedings in respect of any maintenance accruing subsequent to the filing of the schedule? In *Application by Parmanmall Hemanmall*, 35 Ind. Cas. 541 it was held that maintenance order to a wife by a decree is not a debt provable under the Insolvency Act. The fact that a husband, who is in arrears of maintenance, has been adjudicated insolvent, under Sec. 27 of the Provincial Insolvency Act, V of 1920, is conclusive as long as the order of adjudication stands, that he is unable to pay the amount due, and is not therefore guilty of wilful neglect within Sec. 488 (3) of Criminal Procedure Code. *Halfhide v. Halfhide*, 50 Cal. 867.

Interim Order of Protection.—This section contemplates release of a debtor at the time of the admission of his petition if he is already under arrest, but there is no express provision in the Act empowering the Courts to grant interim protection in anticipation of arrest pending the order of adjudication. Sec. 31 deals with application for protection only after the order of adjudication is made. The only other provision which deals expressly with what may be called pro-

tection before adjudication is Sec. 23. The condition under which the Provincial Insolvency Act allows the Court to interfere between an insolvent and his judgment-creditors *before* adjudication is where a decree-holder *has* arrested him. An insolvent is not entitled to make an application under the Act for protection before he is adjudicated unless he has been arrested. *Sinnaswami v. Aligi Goundan*, 47 M. L. J. 530: (1924) M. W. N. 836: 80 I. C. 938: 1924 A. I. R. (Mad.) 893.

Inherent Power.—It will be noticed that the protection granted under this section is a special protection as opposed to a general order of protection pending the order of adjudication. If the debtor is under arrest or imprisonment in execution of a decree of any Court for the payment of money, order of his release from arrest or imprisonment in execution of that decree does not prevent his arrest or imprisonment in execution of other decrees for payment of money pending the order of adjudication. The question is, in the absence of any express legislation whether the court can be presumed to be invested with the power of granting interim protection to a debtor in anticipation of his arrest or imprisonment in execution of any decree pending the order of adjudication. In *Abdul Rajah v. Basiruddin Ahmed*, 14 C. W. N. 586: 11 C. L. J. 435 the Calcutta High Court held that although there is no express provision on this subject, the Court in the first instance as well as the Appellate Court is competent to make an order for *ad interim* protection of the appellant and for the appointment of a Receiver pending the order of adjudication and during the pendency of the appeal. In *Nallagati Goundan v. Ramana Goundan*, 47 M. L. J. 783 the appellant who had filed an application for adjudication as an insolvent applied for *interim* protection and his application was rejected by the District Judge. There was an appeal, and in appeal the High Court held, following *Abdul Rajah v. Basiruddin*, 14 C. W. N. 586, that the District Judge has inherent powers under Sec. 5 to grant the appellant the protection he claimed. The provision under Sec. 23 is a temporary procedure pending the adjudication order and final protection under Sec. 31. Sec. 23 is not mandatory and the Judge is not bound on admitting the petition for insolvency to release the petitioner who has been arrested on security. But the Court is bound to give reasons under Cl. (2) when it rejects his petition for protection. *Nand Lal v. Nathmal Srinivas*, I. L. R. 3 Patna 443: 83 Ind. Cas. 877: (1924) A. I. R. (Patna) 559.

Effect of Release.—If a debtor is once released from arrest or imprisonment in execution of a decree of any court for the payment of money, by the order under this section he is not liable to be re-arrested a second time in execution of the said decree though there is no order to the contrary, *In the matter of Bolai Chand Datta*, 20 Cal. 874, following *The Secretary of State v. Judah*, 12 Cal. 652.

24. [41] (1) On the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Court shall require proof of the following matters, namely:—

(a) that the creditor or the debtor, as the case may be, is entitled to present the petition:

[New] *Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon;*

(b) that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order admitting the petition: and

(c) that the debtor has committed the act of insolvency alleged against him.

(2) The Court shall also examine the debtor, if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon.

(3) The Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition.

(4) A memorandum of the substance of the examination of the debtor and of any other oral evidence shall be made by the Judge, and shall form part of the record of the case.

NOTES.

Review.—This is section 14 of Act III of 1907 with the proviso newly added and corresponds to Sec. 17 of the Bankruptcy Act, 1883. The object of this proviso is explained in the Statement of Objects and Reasons :—

“It is now settled law that under the Act, as it stands, it is not open to the Court to reject the petition of debtor on the ground that the application is an abuse of the law. While admitting that the object of an insolvency law is to deal with all insolvents, whether honest or not, and that no applicant who is in fact insolvent should be liable to have his petition dismissed *in limine*, it seems reasonable that the Court should have discretion as to the amount of protection to be afforded to a petitioning debtor in each individual case, the debtor being required to show that he is in fact unable to pay his debts, and that he has not concealed his property. These changes in the existing law are affected by the amendment” i.e., the proviso newly added.

Hearing of the creditor's petition.—Sec. 9 (b) seems to show that a debt must be indubitably due, but can an Insolvency Court make an enquiry as to a question of this nature? Sec. 24 (1) (a) lays down that the Court shall require proof amongst other matters of the fact that the creditor is entitled to present the petition. This undoubtedly refers back to Sec. 9. Sec. 9 lays down the conditions which entitle a creditor to present a petition against a debtor. In these is included, there must be a debt due to the creditor aggregating to not less than Rs. 500/-. Therefore it is incumbent on the creditor to prove the debt. The Act is based on the English Bankruptcy Act. Sec. 5 (5) of that Act provides expressly for an alternative reference of the creditor in such circumstances, to relief by a regular suit. The omission of any similar provision from the Indian Act indicates that the creditor must be allowed under Sec. 24 to prove the debt when the debtor denies it. Further Sec. 25 provides for dismissal of the petition on failure of the creditor to prove his right to present it, and this obviously involves the necessity of proving that right, in order to avoid dismissal. Therefore an Insolvency Court will not be justified in referring a petitioning creditor to a regular suit to prove his debt. *A. K. R. M. C. T. Chetty Firm v. Maung Aung Buint*, 1923 A. I. R. 21 (Rangoon).

Hearing of the debtor's petition.—This section lays down the procedure to be followed in hearing the petition by and against the

debtor for adjudication, and the evidence that will have to be adduced in each case. It follows the procedure laid down in Sec. 17 of the Bankruptcy Act, 1883. According to the English practice, on a receiving order being made against a debtor on the presentation of his application for insolvency, a day and hour is fixed for the public examination of the debtor and the Court orders the debtor to attend the Court on such day and at such hour. The Court thereupon holds a public sitting on the day appointed for the examination of the debtor and the duty of the debtor is to attend and to be examined as to his conduct, dealings and property. The Court may adjourn the examination from time to time. Any creditor who has tendered a proof may question the debtor at his public examination concerning his affairs and the cause of his failure. The Court may put such questions to the debtor as it may think expedient. The debtor is examined on oath and his duty is to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper are taken down in writing and read over to the debtor and signed by him, and may afterwards be used against him.

Costs.—The Court has a general power over the costs of adjournment of any proceeding, amending any written process, or extending the time. As regards the costs of the petitioner all proceedings down to and including the making of a receiving order are at the costs of the petitioner.

Procedure under the present Act.—

- (1) Admission of the application—S. 19 (1).
- (2) Issue of notices of the date of hearing upon creditors—S. 19 (2).
- (3) Receiving order—S. 20.
- (4) Hearing of the application—S. 24.
- (5) Orders passed upon the hearing of the application—S. 25 (2).

Scope of Enquiry.—The scope of enquiry at the hearing of the petition for adjudication is very limited. In the case of a debtor he is not entitled to present the petition unless (1) he is unable to pay his debts and *either* (2) that his debts all told amount to not less than Rs. 500 *or* (3) that he is under arrest or imprisonment for a money decree *or* (4) an order of attachment in execution of such decree has been made and is subsisting. *Vide* Sec. 10 *supra*. Therefore he has a

right to present the petition on the happening of any of the two events, (1) that he is unable to pay his debts and (2) and one of the three events mentioned in Sec. 10 (a, b, c). That he has committed an act of insolvency (Sec. 6) need not be proved in the case of a debtor as the presentation of a petition by the debtor shall be deemed an act of insolvency, *Vide* Explanation to Sec. 6 *supra*, and *Chhatrapat Singh Dugar v. Kharagsing Lachmiram*, 21 C. W. N. 497.

Change made by the New Act.—Macleod C. J. in *The Laxmi Bank Ltd. v. Ramchandra Narayan Apte*, 46 Bom. 75: 24 Bom. L. R. 292, observes: "In appeal the Joint Judge dealt merely with the question whether the debtor was *unable* to pay his debts, and though it was rightly held that the insolvency should proceed under the provisions of Act III of 1907 he appears to have thought that the New Act had made a change with regard to what was required to be proved before it could be decided that the petitioner had a right to present the petition. As a matter of fact there is no material difference in this respect between the Act III of 1907 and the Act V. of 1920. Under Sec. 11 (1) of Act III of 1907 the debtor had to state in his petition that he was unable to pay his debts, and if either on the face of the proceedings or on a representation of the opposing creditor the Court was satisfied that the statement was not incorrect it could dismiss the petition. But if the debtor had made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the Court was not justified in holding that he was able to pay his debts, but should have admitted the petition so that the interest of the creditors might be benefitted by the special powers given to the Court while administering the insolvent's estate."

Inability to pay debts.—The mere fact that his assets are more than his liabilities will not show that he is able to pay his debts, *Jwala Nath v. Parbati Bibi*, 14 Cal. 691. In dealing with an application for adjudication of insolvency the Court should enquire into the *present value* of the properties which are available for meeting the liabilities of the debtor and decide whether having regard to proviso (a) to Sec. 24 the debtor has proved inability to pay his debts. *Satis-chandra Addy v. Firm of Rajnarain Pakhira*, 72 Ind. Cas. 60. On a debtor's petition to be adjudicated an insolvent the onus is on the debtor to show (1) that on the date of the presentation of the petition he was resident within the jurisdiction of the Court to which he presented the petition (2) that he was unable to pay his debts

and (3) that he was entitled to present the petition under Sec. 10 (1) *Bakshmi Narain Aiyar v. Subramania Aiyar*, 45 M. L. J. 129: 1923 M. W. N. 328: 73 Ind. Cas. 74: 1923 A. I. R. 585 (Mad.).

Quantum of Evidence.—And as regards the quantum of evidence to be adduced in proof of his inability to pay his debts only so much proof is to be given as to make out a *prima facie* case as is sufficient to satisfy the Judge on the point, and not to enter into a detailed examination of his assets and liabilities and so forth. It is necessary to point out in this connection that it is not in the province of the Insolvency Court to enquire at this stage as to the *mala fides* of the petitioner and as to his dealing with his property. These are proper matters of enquiry when an insolvent applies for an order of discharge. Under the proviso to Sec. 24 (1) the debtor can be required to furnish only proof that there are *prima facie* grounds for believing his allegation as to his inability to pay debt. Where the admitted facts were that the debtor's debts amounted to over Rs. 40,000 and his assets to over Rs. 51,000, but that the properties which constituted his assets were under attachment and presumably would be sold under pressure and it was accordingly not possible for the debtor to realise a fair price, held, though there was a balance of about Rs. 8,000/- in the debtor's favour, there was sufficient *prima facie* proof of his inability to pay his debts. *Lakshminarayan Aiyar v. Subramaniya Aiyer*, 45 M. L. J. 129.

“**Provided that.**”—“With reference to this addition it has been objected that it will involve preliminary enquiry into matters which have to be gone into fully at a later stage, particularly if it is alleged that there has been any fraudulent concealment of assets. To meet this objection we have provided that at the stage with which Sec. 14 deals, *prima facie* proof only shall be required of the debtor's inability to pay his assets.”—*Select Committee Report*, 24-9-19.

Abuse of the process of the Court.—Their Lordships of the Judicial Committee of the Privy Council in *Chatrapat Sing Dugar v. Kharag Sing Luchmiram* supra, observed “the dismissal of Chatrapat's petition by the District Court does not purport to rest on any failure to comply with any express terms of the Act. What was held was “the application was an abuse of the process of the court and so must be dismissed.” Presumably it was on this ground too that the High Court dismissed the appeal—no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced

by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles the debtor to an order of adjudication when its conditions are fulfilled. This does not depend upon the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground as an abuse of the process of the Court."

English Law.—When the presentation of a petition is an abuse of the process of the Court, the Court may decline to make any order on it or may rescind a receiving order made on the petition. Thus for husband and wife, if they are neither partners nor joint traders and have no joint assets or liabilities, to present a joint petition for the sake of avoiding the payment of the additional court-fee which would be payable on separate petitions, is an abuse of the process of the Court; the proper order to make is to strike out the name of one of the joint-petitioners, *Re Bond* 1888 21 Q. B. D. 17, *Kaliprasanna Saha v. Harimohon Basak* 24 C. W. N. 461: 31 C. L. J. 206.

Again where a debtor who is an undischarged bankrupt makes a practice of incurring debts and then presenting his own petition for the sake of evading committal orders against him, the presentation of the petition in such circumstances is an abuse of the process of the court, and no receiving order will be made, and even if an order be incidentally made, it will be rescinded, *Re. Betts, Ex parte Official Receiver*, 1901, 2 K. B. 39. Vide notes under Sec. 13 (f).

Examination of the debtor.—The object of the provision for examination of the insolvent under Section 14 (2) now Section 24 (2) is to obtain information at as early a stage as possible of the property and the whole conduct of the debtor in relation to the insolvency proceedings, *Jeer v. Rangaswami*, 36 Mad. 402: 22 M. L. J. 52, and *Girwaridhari v. Joy Narain*, 32 All. 645. No valid order of adjudication can be passed without an examination of the debtor if he is present, *Dialsha v. Miranbaksh*, 23 P. L. R. 1917: 39 Ind. Cas. 745. See also *Banarasi Das v. Banarasi Das*, 9 A. L. J. 233: 14 Ind. Cas. 416; *Gillmore v. Bulackilal*, 19 P. R. 1900; *Manaparanna Padyachy v. Armugum Padyachy*, 1 L. B. R. 229. Where the debtor is examined on oath he must answer all questions put to him in the course of his examination—he cannot refuse to answer questions on the ground that the answers would incriminate him. See Section 31 of the Evidence Act and *Queen v. Gopal*, 3 Mad. 971. A debtor against whom a receiving order

had been made had carried on a business in the manufacture and sale, in England, France and America, of certain proprietary articles made according to secret formulas invented by him and his brother with whom he was in partnership. In his public examination he was required to disclose these formulas in writing to his trustee. The debtor and his brother had each of them agreed not to disclose the secret. Upon the dissolution of the partnership, the bankrupt retained the assets and the good-will of the business in England and America, while his brother continued to carry it on in France. The formulas had never been committed in writing. The bankrupt refused to disclose them on the ground that they existed only in his brain as the result of his skill and capacity and that to disclose them would be a breach of his agreement with his brother. *Held* that the formulas were part of the goodwill and assets of his business and that he was bound to communicate them to his trustee. *In Re. Keene* (1922) 2 Ch. D. 475.

25 [15(1)] (1) *In the case of a petition presented by a creditor, where*

Dismissal of petition.

the Court is not satisfied with the proof of *his* right to present the petition or of the service on the debtor of *notice of the order admitting the petition*, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

[New] (2) *In the case of a petition presented by a debtor, the Court shall dismiss the petition if it is not satisfied of his right to present the petition.*

NOTES.

Review.—This is Sec. 15 (1) of Act III of 1907, and corresponds to Section 7 (3) of the Bankruptcy Act, 1883.

Creditor's petition.—In the case of a petition presented by a creditor what the court is required to be satisfied with is (1) that the debt owing to the creditor, or if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors amounts to Rs. 500/-, (2) that the debt is a liquidated sum payable immediately or at some certain future time, (3) and the act of insolvency on which

the insolvency petition is grounded has occurred within three months before the presentation of the petition (S. 9). A creditor's right to present the petition accrues only on the happening of these three events and at the hearing he will have to prove the combination of the above three elements, and that the notice of his application has been served upon the debtor in the manner prescribed for the service of summons S. 19 (3). In addition to the above he will have to show that the debtor ordinarily resides, carries on business or personally works for gain within the jurisdiction of the court (S. 11).

If the creditor cannot establish by evidence the points above referred to or that the debtor is in a position to pay his debts or that the presentation of the petition is an abuse of the process of the Court, his petition should be dismissed, otherwise the order of adjudication should be passed and the vesting order made, *Re. Davies, Ex parte King* 1876 3 Ch. D. 461.

Secured Creditor's petition.—"A secured creditor may not petition for adjudication of an insolvent unless he is willing to relinquish his security for the benefit of the general body of creditors or gives an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated," *Bank of Upper India v. The Administrator-General of Bengal*, 45 Cal. 653 (664). *Vide also notes under Sec. 47 infra.*

Sufficient cause.—Sec 15 (1) of Act III 1907 which empowers the Court to dismiss a petition for any sufficient cause dealt entirely with a petition of a creditor and not by a debtor. *Trilokinath v. Badridas*, 36 All. 250: 12 A. L. J. 355 (F. B.) *Mi Bu v. Ngapo Soung* U. B. R. (1911) 84: 11 Ind. Cas. 743. *Tin Ya v. Subya Pillay* 6 L. B. R. 146: 5 Bur. L. T. 277: 18 Ind. Cas. 500. It is impossible to specifically state what will be sufficient cause, *Re. Otway, Ex parte Otway, supra*. If the Court is satisfied by the debtor (1) that he is able to pay his debts or (2) for any other sufficient cause no order ought to be made, the Court shall dismiss the petition, *Preo Nath v. Nibaran*, 15 C. L. J. 631. See also *Girvadhari v. Jui Narain*, 32 All. 645. What would be sufficient cause must depend on the circumstances of each case, *Aruna Chellan v. Maung P'o Thin* 9 Ind. Cas. 461.

Debtor's Petition.—In the case of a petition presented by the debtor what the Court is concerned with is to satisfy itself that the debtor is entitled to present the application and nothing more, and that he

satisfies the requirements of Sec. 10. viz. (1) that he is unable to pay his debts (2) that his debts amount to Rs. 500 or (3) that he is under arrest or imprisonment in execution of a money decree or (4) that an order of attachment is subsisting. And his petition is liable to be dismissed only on his failure to prove the above and on no other grounds. *Udai Uhand Maiti v. Ramkumar Khara*, 15 C. W. N. 213, *Shaikh Samiruddin v. Kadumoyee Dassee*, 15 C. W. N. 244. *Shaikh Golam Rahaman v. Shaikh Wahid Ail*, 16 C. W. N. 853, *Chatrapat Sing Dugar v. Kharagsing Luchmiram*, 21 C. W. N. 497: 25 C. L. J. 215, *Jeer v. Rungaswami*, 36 Mad. 402, *Girvadhari v. Jaynarain* 32 All. 645, *Jagannath v. Ganga Dutt* 41 All. 486. Under Sec. 13 (1) the debtor has to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation of the opposing creditor, the Court is satisfied that the statement is not correct, it can dismiss the petition. But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the Court is not justified in holding that he is able to pay his debts, but admit his petition. *The Laxmi Bank Limited Poona v. Ramchandra Narayan Apte*, 46 Bom. 757: 24 Bom. L. R. 292.

Scope of Enquiry.—Walsh, A. C. J., says “Sec. 25 is rather a trap for Judges who do not take pains to understand it.” When an act of insolvency is alleged under this section the Judge must *first* satisfy himself whether the creditor is for the amount alleged, or for a sufficient amount to justify a petition under the Act, or, in other words, that the creditor has a right to present the petition. The Court must *then* be satisfied of the service of notice on the debtor of the order admitting the petition. It must *then* be satisfied or express its dissatisfaction for adequate reasons with the alleged act or acts of insolvency. It must *then* consider whether it has been satisfied by the debtor that he is able to pay his debts. In conclusion, when the learned Judge has come to all the necessary findings on the issues indicated above, and he still finds that there is *prima facie* ground for making an order against the insolvents, he must consider whether there is *any other sufficient cause* why no order should be made. The mere fact that payments have been made to the creditors of an insolvent between the filing of the petition for insolvency and the hearing is not a ground for dismissing the petition. It is not sufficient for a Judge to seize hold of a vague clause in Sec. 25 that “for some other sufficient reason” no order ought to be made unless he makes it clear what the

sufficient cause is, and what the surrounding circumstances in the case are. *Tara Chand v. Jugal Kishore*, 46 All. 713: 22 A. L. J. 684: 83 Ind. Cas. 967: 1924 A. I. R. (All.) 686. The provisions of Ss. 10 to 25 were intended to prevent the abuse of debtors filing their applications as a method of evading liability for arrest and getting out of payment of their debts. A finding that a Judge is not satisfied that the appellants are unable to pay their debts must be a finding arrived at like any other finding by a judicial tribunal in which the reasons for so holding is stated in such a way that it may be checked against the evidence and weighed in the balance. *Mathura Ram v. Baldeo Ram*, 80 Ind. Cas. 21: 1924 A. I. R. (All) 800.

Dismissal on the ground of assets exceeding liabilities or concealment of property.—A judge should state the ground or one of the grounds set forth in S. 15 (1), now Sec. 25, as that on which he dismisses the insolvency petition, *Preonath v. Nibaran*, 15 C. L. J. 631: 15 Ind. Cas. 870. A debtor's application to be adjudged an insolvent cannot be dismissed on the ground that the assets of the debtor as set out in the schedule exceed his liabilities or that the debtor has concealed some of his properties, *Jwala Nath v. Parbati Bibi*, 14 Cal. 691, *Baldeodas v. Sukhdodas*, 19 All 125: 21 A. W. N. 97, *Kali Kumar v. Gopikrishna*, 15 C. W. N. 990, *Shaikh Gholam Rahaman v. Shaikh Wahed Ali*, 16 C. W. N. 853: 16 Ind. Cas. 470, *Kidhata Din v. Jagannath*, 9 A. L. J. 699; *Muhammad Hussain v. Elahi Baksh*, 10 A. L. J. 188: 17 Ind. Cas. 92, *Khasim Hussain v. Bishan Sing*, 14 Ind. Cas. 224, *Tulsi Ram v. Gholam Mahiuddin*, 10 P. W. R. 1903. A debtor applied to be adjudicated insolvent but his petition was dismissed on the ground (1) that he had allowed a register containing the names of pilgrims allotted to him on partition to remain with his brothers, (2) that he had removed his place of residence, (3) that he had inserted fictitious amounts of his income; held that none of these grounds was a valid ground for dismissing the petition, *Muni Lal v. Sasibhuson Ray*, 2 Pat L. T. 166: 60 Ind. Cas. 848. In dealing with an application for adjudication of insolvency the Court should enquire into the *present value* of properties which are available for meeting the liabilities of the debtor, and not to dismiss the petition on the ground that the value of the properties was or might have been more. *Satischandra Addy v. Firm of Rajnarain Pakhira*, 72 Ind. Cas. 60. See also *Lakshinarayan Aiyar v. Subramaniam Aiyar*, 45 M. L. J. 129: 1923 M. W. N. 328. 73 Ind. Cas. 74.

Dismissal on the ground of abuse of process.—The Court would decline to pass an order of adjudication where it would amount to an abuse of the process of the Court, *Ponnuswami Chetty v. Narayanaswami Chetty*, 14 M. L. T. 355, *Tin Ya v. Subayya Pillay*, 6 L. B. R. 149: 18 Ind. Cas. 500: 5 Bur. L. T. 277. What is or is not an abuse of the process of the Court is to be judged in each case according to its circumstances. An abuse implies that the petition was presented in order to perpetrate a fraud, *Maung Po Mya v. Maung Po Kiya*, 30 Ind. Cas. 943. Under the law of England it is well settled that when the presentation of a petition is an abuse of the process of the Court, the Court may decline to make any order on it, or may rescind the receiving order made on the petition. This principle was recognised in the cases of *In Re. Betts*, (1901) 2 K. B. 39, *In Re. Painter*, (1895) 1 Q. B. 91, and has been applied by all the Indian High Courts. It was indicated as applicable to the Provincial Insolvency Act in the case of *Sumiruddin v. Kadumoyee Dussée*, 15 C. W. N. 244: 12 C. L. J. 445, and has been recently accepted by two Full Benches, one of the Allahabad High Court in *Triloki Nath v. Badri Das*, 36 All. 250, and the other of the Madras High Court in *Ponnuswami Chetty v. Narasimha Chetty*, 25 M. L. J. 445. We must take it then as well settled that notwithstanding proof of the existence of the conditions mentioned in the statute, the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court. *Malchand v. Gopal Ch. Ghoshal*, 21 C. W. N. 298. And in *Re Ballav Chand Serowieg*, 27 C. W. N. 739 it was held, following *Malchand v. Gopal Chandra*, that the presentation of a second insolvency petition by the debtor on the same facts was an abuse of the process of the Court, and the second adjudication order founded on it must be annulled.

What Order should the Court Pass.—Being satisfied on enquiry as to the truth of a creditor's petition that a debtor committed an act of insolvency in that he alienated his properties with intent to defeat his creditors, a judge not only adjudicated the debtor an insolvent, but also annulled the alienation by the same order before appointing a Receiver. Held that the order of annulling the alienation was illegal, that it was for the Receiver to apply for such an order and that until the Receiver refuses to do so, no one else has a right to apply. *Appi Reddi v. Appi Reddi*, 45 Mad. 189: 41 M. L. J. 608: 1921 M. W. N. 816: 14 L. W. 639, following *Hemraj Champalal v. Ramkishan Ram*, (1916) 2 Pat. L. J. 101.

Appeal.—An appeal lies against an order dismissing a petition under this section, *vide* Section 75, and Schedule I *infra*.

26 [15(2)(3)] (1) Where a petition presented by a creditor is dismissed under sub-section (1) of section 25, and the Court is satisfied that the petition was frivolous or vexatious, the Court may, on the application of the debtor, award against such creditor such amount, not exceeding one thousand rupees as it deems a reasonable compensation to the debtor for the expense or injury occasioned to him by the petition and the proceedings thereon, and such amount may be realised as if it were a fine.

(2) An award under this section shall bar any suit for compensation in respect of such petition and the proceedings thereon.

NOTES.

Review.—This is sec. 15 (2) & (3) of Act III of 1907. Under this section the Courts are invested with summary jurisdiction to award compensation where such an application presented by a creditor is found to be frivolous and vexatious.

It provides for the imposition of a penalty up to Rs. 1,000 upon the creditor payable to the debtor in case the creditor's application is rejected on the ground that the creditor had no right to present the petition or that the notice of the application had not been served upon the debtor or that the debtor had not committed the acts of insolvency alleged in the petition or that the application of the creditor was not *bona fide* but made for a collateral purpose or it is an abuse of the process of the court. The sum is awarded by the court to the debtor as compensation and it has been provided that the penalty will be realised from the creditor as a fine, *i.e.*, according to the provisions of Sec. 386 of the Criminal Procedure Code, by distress warrant and seizure and sale of movable and immoveable property. "It provides a prompt remedy against wanton and malicious applications by creditors."

Dismissal.—The fact that a petition has been dismissed will not bar a creditor from presenting a second petition based on the same

debt on a new act of insolvency, *Re. Victoria* 1894 2 Q. B. 387, *King v. Henderson* 1898 A. C. 720, *Oriental Bank v. Richer*, 9 A. C. 413. This order of dismissal may be set aside if it has been obtained by fraud, *In the matter of Ramsebak Misser*, 6 B. L. R. 310.

Frivolous and vexatious.—"Frivolous implies that the accusation is of a trivial nature but it may or may not be false. *Vexatious* implies that the accusation is one which ought not to have been made and which is intended to harass the accused." *Beni Madhab v. Kumud Kumar*, 30 Cal. 123: 6 C. W. N. 799

Sub-section (2).—No suit for damages lies if any compensation has been awarded to the debtor under this section.

Appeal.—An appeal lies against an order awarding compensation, *vide* Section 75 and Schedule I *infra*.

27 [16 (1)] (1) *If the Court does not dismiss the petition it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge.*

[New] (2) *The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit :*

NOTES.

Review.—This is sec. 16 (1) of Act III of 1907 with the words " and the debtor.....provided " omitted. Sub-section (2) is new, and the reason for this new provision is explained in the Statement of Objects and Reasons :—

" One of the principal defects in the existing law arises from the fact that the conduct of the debtor in many cases never comes under the scrutiny of the Court. The stage at which the misconduct of the debtor should come before the Court, and at which most of the provisions affecting a fraudulent insolvent would operate, is when he applies for his discharge. But there is nothing in the Act which requires him

to apply for his discharge, and in practice such applications are rare. To remedy this unsatisfactory state of the law, it is proposed to include in the Act provisions which will compel an insolvent to apply to the Court within a prescribed period for his discharge or to lose the protection afforded by the insolvency proceedings. The court will have power to extend the prescribed period and when the adjudication order is annulled owing to the failure of the insolvent to apply in time for his discharge, fresh petition on the same facts will be barred." These proposed changes are effected by the proviso under Sub-section (2).

Difference.—There is considerable difference between the scope of sec. 16 (1) of Act III of 1907 and the present section about the passing of the order of adjudication. Under sec. 16 of Act III, if the petition either of the debtor or of the creditor was not dismissed, the order of adjudication would not be passed if the debtor could propose any scheme of composition to the Court for the acceptance of the creditors. The Court used to issue notices upon the creditors, consider their objections, if any, to the scheme, and then passed such orders as it thought fit and proper. Under the present section, the Court has no other alternative but to pass either an order of adjudication or to dismiss it, and the Court would not consider any scheme for composition before adjudication if the debtor had any to propose. *Vide Iachminarain Dube v. Kripan Lall*, 10 A. L. J. 703: 47 Ind. Cas. 733, *Ramrakha Mal v. Nazar Mal*, 52 P. R. 1918: 47 Ind. Cas. 435.

"Both sections 16 (1) and section 27 contemplate the possibility of a composition or scheme before adjudication. The Presidency Towns Insolvency Act in section 28 on the other hand only contemplates a composition after adjudication. Under the English Law a composition can be made (1) after the receiving order and prior to adjudication or (2) after adjudication. But under the Indian Law there is no receiving order procedure at all, and the order of adjudication is made on the hearing of the petition. It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it in dealing with compositions or schemes prior to adjudication. It is therefore proposed to follow in this respect the procedure under the Presidency Towns Insolvency Act and allow compositions and schemes only after adjudication."—*Notes on Clauses.*

In passing an order of adjudication the Court shall also under the present section pass an order that the insolvent should apply for his discharge within a time to be fixed by the Court in that behalf failing

which the order of adjudication will be annulled. *Vide Sec. 43 infra.* The period within which an insolvent must apply for his discharge has to be specified in the order of adjudication itself, and where a petition is sent to the Official Receiver and the latter makes an order of adjudication, he has power also to fix the period within which the insolvent must apply for his discharge. *Arunagiri Mudaliar v. Kandaswami Mudaliar*, 83 Ind. Cas. 955: 1924 M. W. N. 331: 1924 A. I. R. (Mad.) 635.

Sub-section (2).—There is no doubt that the Court has the power to extend the time. The only question is whether it can do so after the expiry of the period originally fixed. The Section if read subject to Sec. 43, no doubt leads to the inference that on the expiry of the period specified, adjudication becomes automatically annulled if no application is made prior to expiry of the period. The Calcutta High Court in *Abraham v. Sukias*, 51 Cal. 337; 81 Ind. Cas. 584: 1924 A. I. R. (Cal.) 707, has held that “it is true that Sec. 43 provides that the order of adjudication shall be annulled; but that seems to indicate that it is to be annulled at the instance of the opposite party or by the Court itself, and does not stand cancelled automatically on the expiry of the period. We think that under Sec. 27 clause (2) the Court has the power to extend the time even after the expiry of the period of the order of discharge.” Krishnan, J., held that the power conferred by Sec. 27 (2) to extend the time fixed for applying for discharge is not exhausted by the period originally fixed having expired. There is nothing in the Act to prevent the Court from extending the time after the period originally fixed has expired under Sec. 43 of the Act. Sec. 148 C. P. Code, 1908, is applicable to the insolvency proceedings by virtue of Sec. 5 (1) of the Provincial Insolvency Act and would justify an extension of time in such a case even after the expiry of the period originally fixed. Waller J., on the other hand, held that Sec. 43 is absolutely peremptory in its term and directly the Court is informed of the insolvent's omission to apply for discharge within the time fixed, the only course open to it is to annul the adjudication; no application for extension of time can lie after the expiry of the period originally fixed and Sec. 148, C. P. Code, is applicable to insolvency proceedings only so far as it does not conflict with the provisions of the Provincial Insolvency Act. *Arunagiri Mudaliar v. Kandaswamy*, *supra*.

Appointment of Receiver.—Where after an order of adjudication a District Court has not made an order vesting the property of the insol-

ment in the Receiver it is not the Receiver but the Court in whom such property vests. But when before an order vesting the property in the Receiver has been made, the Receiver purports to sell the property and the Court subsequently makes an order vesting the property in the Receiver, the title to the property becomes complete either on the principle of ratification or under Sec. 43 of the T. P. Act. *Narasimulu v. Basava Sankaram*, 1925 A. I. R. (Mad.) 249. *Vide notes under Sec. 56 infra.*

Appeal.—An appeal lies against an order of adjudication under this section, *vide* Section 75 and Schedule, I, *infra*.

28. (1) *On the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors.*

Effect of an order of adjudication

[16 (2), (3), (4)] (2) On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt proveable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose.

(3) For the purposes of sub-section (2), all goods being at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent. •

(4) All property *which is* acquired by or devolves on the insolvent after the date of an order

of adjudication and before his discharge shall forthwith vest in the Court or receiver, and *the provisions of sub-section (2) shall apply in respect thereof.*

[16 (2) (a)] (5) *The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.*

[16 (5) (6)] (6) Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

(7) An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

NOTES.

Review.—This is mainly sec. 16 (2), (3), (4), (5), (6), (7) of Act III of 1907. The sub-section (1) is new.

The introduction of sub-section (1) is explained in the *Notes on Clauses*:—"Apparently the duties imposed on the debtor by sub-section (1) of section 43 arise as soon as the Court has made an order under section 12 (1). It seems desirable to make this clear. It is difficult to see how the debtor can be under any obligation to assist in the distribution of his property, unless he is adjudged an insolvent. It is proposed therefore to amend the concluding part of sub-section (1) and to relegate to a separate sub-section the provisions which impose on the debtor the duty of aiding in the distribution of his property." Sec. 28 summarises not only the rights of the creditors but also defines the properties that are liable to be distributed amongst them. It should be noted that though Sec. 28 (2) defines that "the whole of the property of the insolvent shall vest in the Court or in a Receiver" it defines the term 'property' in Sec. 28 (3), 28 (4) and 28 (5). Sec. 28 (3) lays down that for the purposes of insolvency all goods in the possession or disposition of the insolvent in his trade or business at the date of the presentation of his petition, by the

consent and permission of the true owner, shall vest in the Receiver and be divisible amongst his creditors, though he may not be the real owner thereof. Sec. 28 (4) lays down that not only the property which he was possessed of at the date of the presentation of the petition but also the properties which may be acquired or inherited by him after order of adjudication would vest in the Receiver and be liable to be distributed amongst the creditors. Sec. 28 (5) lays down that the properties which are exempted from attachment either under Sec. 60 of the C. P. Code or any other law for the time being in force do not vest in the Receiver and are not liable to be distributed amongst the creditors. Section 28 (6) defines the rights of the secured creditors, and 28 (7) lays down the period from which the order of adjudication takes effect.

Sub-section (1).—The duties of the insolvent under the Act *before* adjudication are given in sec. 22, and those *after* adjudication in the present sub-section.

Adjudication.—The order of adjudication means an order that the debtor by or against whom an insolvency petition was presented has been legally found by the court to be unable to pay his debts, and the effect of that order is (1) to vest all property of the debtor in the Court or a Receiver appointed by the Court so that he may get in and collect all the dues of the debtor and rateably distribute it to his creditors, and (2) to release the debtor from his liabilities. This is the statutory right of an honest debtor and his paramount duty is to help the Receiver in getting in and collecting all his dues and assets and to place his assets unreservedly at the disposal of the Receiver and to render all possible aid for the realisation of his estate so that his creditors may get as much as possible for their dues out of the same. Distinguishing *Kakadas v. Gujju Sing*, 43A. 519, it was held in *Govind Ram v. Kunj Behari Lall* 22 A. L. J. 217, that a plaintiff, though an insolvent, could not in a Revenue Court maintain a suit for profits, and could not therefore, transfer his rights to sue for those rights and the transfer, if any, made by the insolvent, after adjudication does not confer any right title and interest to the assignee.

A debtor is bound to appear for his examination though he may reside more than two hundred miles away from the court-house. *In Re. Cowasji Polkerji*, 13 Bom. 114, *In Re. Ganeshdas Pandalar*, 32 Bom. 198, *In Re. Nooraji Sarabji*, 33 Bom. 462.

Sub-sections (2).—Sub-section (2) is divided into 2 parts, the first part being "On.....creditors" and the latter part which is as a

corollary to the first part being "no creditor.....impose." The words "as hereinafter provided" qualify the word "Receiver" and not the word "vest" in that sub-section, *Official Receiver of Coimbatore v. D. D. Kungu*, 14 L. W. 655: 1921 M. W. N. 858.

As soon as a debtor is adjudicated an insolvent the Court takes upon itself the administration of his estate for the benefit of the general body of creditors, and for that purpose it will have to take possession of all the property that the debtor held or was possessed of at the time of the presentation of the application or may become possessed of at any time during which the insolvency proceeding may remain pending. This is the first part of sub-section (2). The Court taking upon itself the administration of the property of the debtor for the benefit of *all* the creditors and for the purpose of making an equitable distribution to them, it follows that no one creditor should be allowed to attach any property for the realisation of his own dues—that would be inequitable to other creditors. Hence the sub-section provides that "on.....impose," *Vasudeb Kamath v. Luchminarain*, 42 Mad. 684: 26 M. L. J. 453: 52 Ind. Cas. 442.

Difference between the Old Act III of 1907 and the New Act.—There is no question that the position of an insolvent under the New Act is very different from what it was under the Old Act. Under the Old Act he was normally immune from arrest and his arrest could only be obtained, if at all, by special leave of the Court, which might put the creditor to terms and in which the burden of showing the special circumstances for departing from the general rule would be upon the creditor. Under the present Act, the creditor can proceed as if no adjudication had taken place. It lies on the debtor to move the Court to obtain protection and the order may be refused if any act of bad faith on the part of the debtor is shown. Moreover the order may be so framed as to apply only to certain debts or to be operative only for a limited time. The immunity from arrest which an adjudication under the Act of 1907 conferred was certainly regarded as a privilege by the persons concerned, and indeed a highly valued privilege, so much so that it is notorious that it formed the motive for a large proportion of the applications for adjudication which were filed. A person, therefore, who was adjudged insolvent under the Provincial Insolvency Act of 1907 and has not been discharged is immune from arrest in execution of a decree and the provisions of the New Act of 1920 do not affect his position. *Radhey Shyam v. Hakim Saiyed Md. Taqui*, 72 Ind. Cas. 911: 1923 A. I. R. 36 (Oudh).

Character of the Receiver's Interest.—"A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy. The whole property of the insolvent is vested in him and he is owner of the property until he is discharged." *Amrita Lal Ghose v. Narain Chandra Chakravarti*, 30 C. L. J. 515. It has therefore been held that it is not necessary to obtain the leave of the Court to proceed against the Receiver appointed under the provisions of the Provincial Insolvency Act. *Sant Prasad Singh v. Sheodut Singh*, 2 I. L. R. Pat. 724. But his duties fall within the purview of Sec. 2 (17), C. P. C. and outside the Insolvency Court which appointed him, he is entitled to the protection afforded by Sec. 30 C. P. C. *Murari Lal v. E. V. David*, 84 Ind. Cas. 739: 22 A. L. J. 1116.

What is Property.—Property has been defined in Section 2 (d) and under Section 168 (1) of the Bankruptcy, Act, 1883. It includes money, goods, things in action, land and every description of property whether real or personal, whether situated in England or elsewhere; also obligations, easements, and every description of estate, interest and profits, vested or contingent, present or future, arising out of or incident to property thus defined. In order to constitute property of the insolvent, the goods must be "in the order and disposition" of the insolvent. *In the matter of Bansidhar Khettry*, 2 Cal. 359, it was held that 'the goods were not in the order and disposition of the insolvent which he agreed to part with before the order of adjudication and for which he had received consideration, though the goods were still with the insolvent pending delivery.' *In Re. Murray an Insolvent*, 3 Cal. 59, it was held that the goods in the hands of the insolvent discharged of the creditor's lien and subject only to the terms of the receipt which, at the outside only amounts to an agreement to sell goods and apply the proceeds in liquidation of debts due to the creditor, were in the order and disposition of the insolvent as a Commission Agent and therefore rightly vested in the Official Assignee.

In Re. Marshall, 7 Cal. 421, held "where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit, the owner who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit."

A Railway Receipt is a mercantile document of title to goods and lawful possession as pledgee of such receipt enables the holder by virtue of local custom to get possession of the goods and the insolvent's right to get possession of them ceases with the pledge, *Vikarppa v.*

Thippara, 38 Mad. 664. A commission Agent has a disposing power which he may exercise for his own benefit over goods entrusted to him for sale, such goods are therefore his property for the purposes of the Insolvency Act, and a Receiver can take possession of them as his property in insolvency proceedings against him, *In Re. Messrs. Kadi-bhoy Ismailji Lotia*, 11 Ind. Cas. 14. "A direction to deposit one-fourth of the insolvent's salary could not have been given, the proper course would have been to direct the Receiver to arrange for payment to him of one-half of the salary earned by the insolvent, salary being property within the meaning of Sec. 16 (2) (a), now section 28 (2) and only half of the salary which exceeded Rs. 40 a month being exempt from attachment under section 60 C. P. C." *Ramchandra Neogi v. Syama Charan Bose*, 18 C. W. N. 1052: 19 C. L. J. 83: 21 Ind. Cas. 950, *Devi Prasad v. J. A. N. Lewis*, 16 A. L. J. 107. The property of the insolvent alone vests in the Receiver and not of any other person, *Hasmat Bihl v. Bhagwan Das*, 26 All. 65. Held also in *Sannyasi Churan Mondole v. Asutosh Ghose*, 42 Cal. 225, that it is not open to the Court to direct the Receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents. See also *In Re. Nabadwip Chandra Shah, an Insolvent*, 13 Cal. 68. A testator bequeathed a share in his residuary estate to his son. The son died in the testator's life-time leaving issue who survived the testator, but having been adjudicated bankrupt without obtaining the order of discharge:—held, that the trustee in bankruptcy was entitled to the son's share in the residuary estate, *Smith v. Pearson*, (1920) L. R. 1 Ch. 247. Held also in *Muchiram v. Ishan Chunder*, 21 Cal. 568 F. B. that all actionable claims are property. A right to receive a debt is 'property' and vests in the Receiver, *Onkarsa v. Bridichand*, 73 Ind. Cas. 1037: 1923 A. I. R. 293 (Nag.). "The statutory tenancy to which the defendant became entitled was property." *Parkison and ors. v. Noel*, 1923 1 K. B. D. 117. Secret formulas invented by a bankrupt for the manufacture of certain special articles were part of the goodwill and assets of his business and therefore 'property.' *In Re. Keene*, 1922, 2 Ch. D. 475. In respect of properties belonging to an insolvent which are subject to a mortgage or charge, what vests in the Official Receiver upon an adjudication of insolvency and the making of a vesting order is the insolvent's equity of redemption which at the time constitutes "the whole property of the insolvent." *Mokshagunam v. S. V. Ramakrishna*, 70 Ind. Cas. 357. Where any part of the insolvent's property

is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution. *Govinda v. Abdul Kadir*, 1923 A. I. R. 150 (Nag.).

Lease.—Under Sec. 111 (g) of the T. P. Act, in order to have a forfeiture of a lease there should be an express condition to that effect. A lease cannot, therefore, come to an end in the absence of a condition to that effect in the lease deed, merely because the lease money is not paid by the lessee or on his insolvency by the Insolvency Court. Under Sec. 28 (2) the whole of insolvent's property vests on the Insolvency Court on an order of adjudication being passed. As regards onerous properties such as leases the Official Assignee has the right to elect whether he will accept or repudiate the leasehold property belonging to the insolvent and unless he accepts it, such property is not considered to vest in him. The unaccepted property continues to vest in the insolvent, for there is nothing in the Insolvency Act to incapacitate an insolvent from holding separate property provided the persons dealing with him are aware of his insolvency, *Mahadeo v. Jainarain*, 62 Ind. Cas. 850. A statutory tenancy is property of the tenant under the English Law. The plaintiffs having let to the defendants a dwelling house, the defendant retained possession of it after the expiration of the term. The defendant was afterwards adjudicated bankrupt and the trustee in bankruptcy disclaimed any interest in the house. In an action by the plaintiffs against the defendant for possession of the house and mesne profits—*held* that the statutory tenancy to which the defendant became entitled was property within the meaning of Sec. 167 of the Bankruptcy Act, 1914, and passed under Sec. 53 to his trustee in bankruptcy, that on disclaimer thereof by the trustee, that interest in the property ceased to exist and was no longer available for the benefit of the defendant, and consequently that the plaintiffs were entitled to judgment. *Parkinson and ors. v. Noel*, 1923, 1 K. B. D. 117, followed in *In Re. Abu Baker Haji Abdulla*, 48 Bom. 580: 26 Bom. L. R. 628.

Mitakshara Joint Family Property.—There is a considerable divergence of opinion as to whether the undivided share of a member in Mitakshara joint-family property is 'property' within the meaning of Sec. 2 (1) (d) of the Provincial Insolvency Act, 1920, so that it will vest in the Court or in a Receiver under this section on the making of the order of adjudication. In *Sadarmul v. Rao Bahadur*, 21 Bom. 205, it was held that the undivided share of a member in

Mitakshara joint-family property vests in the Official Receiver. In *Suraj Bansi v. Sheo Pershad*, 5 Cal. 143 (P. C.), held it is a settled law in Madras and Bombay Presidencies that one coparcener may dispose of ancestral undivided estate to the extent of his own share. In Bengal it is now settled law that the purchaser of an undivided property sold for a separate debt acquires the debtor's interest in such property. Hence it vests in the Receiver in insolvency. The property of the insolvent will vest in the receiver subject to those equities to which they were subject in the hands of the insolvent. *Purshotam Naidu v. Ponnurungam*, 1913 M. W. N. 897: 15 M. L. T. 92: 21 Ind. Cas. 576. Also *W. E. Howatson v. W. E. Durrand*, 27 Cal. 351: 4 C. W. N. 610.

Where a father and his minor sons constituted a joint Hindu family and the father being adjudged an insolvent the Receiver attached and put up to sale the whole of the co-parcenary property belonging to the family, held, upholding the Receiver's action that, from the date of the adjudication the Receiver took over all rights in the insolvent's property which the insolvent himself possessed including the right to alienate co-parcenary property belonging to himself and his minor sons in satisfaction of antecedent debts not tainted with immorality. which had been incurred by him, *Bawan Dass v. O. M. Chiene*, 44 All. 316: 20 A. L. J. 155. In a Mitakshara family if a father is declared insolvent for debts not contracted for immoral purposes then the whole of the interest of the father as well as of his sons vests in the Receiver, *Harmukh Roy Munno Lall v. Radha Mohan*, 54 Ind. Cas. 931. *Vide also Fakirchand v. Motichand*, 7 Bom. 438, *Rangya Chetti v. Tanikchella Mudaly*, 19 Mad. 74, *Sitaram v. Beni Prasad*, 84 Ind. Cas. 790.

On the insolvency of the managing member of a joint Hindu family the Official Assignee succeeds to (1) the undivided interest of the insolvent in the joint property and (2) his rights as managing member so far as they can be exercised for his own benefit. He is not entitled to have vested in him the shares of other members, although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency. He can alienate the interests in the joint property of the minor sons of the insolvent for the purpose of paying the insolvent's debts unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not. The Official Assignee is not an alienee but the representative of the insolvent and is entitled to all the rights includ-

ing rights of possession of the joint property except such rights as are in their nature personal to a member of the family as such. *The Official Assignee, Madras v. Ramchandra Aiyar*, 46 Mad. 55: 43 M. L. J. 569. So also in *Chellaram v. Official Receiver*, 1923 A. I. R. 20 (Sind.) it has been held that under the Mitakshara law, a father has a right to dispose of his son's interest in ancestral immovable property for the payment of his own debts not contracted for immoral purposes, and such interest is therefore 'property' within the meaning of Sec. 2 (d) and vests in the Receiver. In Oudh also, it has been held in *Lal Bahadur v. Paspal Prasad*, 1923 A. I. R. 154 (Oudh) dissenting from *Anant Singh v. Kalka Singh*, 5 O. L. J. 665, 18 Ind. Cas. 526, that an undivided member has an interest in ancestral property and that would amount to 'property' as defined in the Insolvency Act. In the Punjab the question of law submitted to the Full Bench in *Behari Lal v. Sat Narain*, I. L. R. 3 Lahore 329, was whether an order made by an Insolvency Court adjudging a Hindu father an insolvent has the effect of vesting in the Official Assignee his son's interest in the property of the Mitakshara joint-family consisting of the father and the son. In answer to that question the Full Bench held "it has, however, been repeatedly held, *vide inter alia Jagubhai Lallubhai v. Vijbhukundus*, 11 Bom. 37 and the Privy Council decisions cited therein, that the joint-family property can be attached and sold in execution of a decree for money passed against the father, and that the sale affects the interest of the son as well as that of the father, and, in principle, I see no real difference between an individual creditor realising his debt from the co-parcenary property and an Official Assignee, who represents the general body of the creditors seizing it for the satisfaction of their debts. It is to be observed that Sec. 266 C. P. C. of 1882 which enumerates the various kinds of property of a judgment debtor which are liable to be attached and sold in execution of a decree for money as well as Sec. 60 of the C. P. Code of 1908, which has replaced that section, mentions, *inter alia*, the property over which or the profits of which the judgment-debtor, "has a disposing power which he may exercise for his own benefit." And, as pointed out already, this is exactly the phraseology which has been used in the Insolvency Act, and it would be most undesirable that the same expression used in two enactments dealing with the rights of the creditors should receive two different interpretations. Having regard to these considerations and to the judgments which are directly in point I would answer the question referred to

the Full Bench in the affirmative." *Per Sir Shadi Lal, C. J.* The same view has been taken in the recent Full Bench case of *In Re Sellamuthu Servai*, 47 Mad. 87 (F. B.): 1924 M. W. N. 94, and also in *Sankaranaiyan Pillai v. Rajamani*, 47 Md. 462: 46 M. L. J. 314, and *Narayan Ganesh v. Sagunabai Gungadhar*, 26 Bom. L. R. 1200, *Kuppusami v. Marimuthu*, 82 Ind. Cas. 438: 47 M. L. J. 487: 1924 M. W. N. 807. The Concensus of opinion of all the Indian High Courts seems to have been that a Hindu father who had incurred debts and was adjudged an insolvent and his estate vested in the Official Assignee, and the Official Assignee steps into the shoes of the father and can sell the sons' shares also in the ancestral estate to discharge such debts which were neither illegal nor immoral.

But in the Patna High Court case of *Sant Prasad Singh v. Sheo Dutt Singh*, I. L. R. 2 Patna 724, it has been held "no doubt there is a line of cases long before *Sahu Ramchandra's Case*, I. L. R. 39 All. 437 (P. C.), was decided by the Judicial Committee, that the member of a joint Mitakshara family has an interest which is capable of passing to a Receiver upon insolvency. But *Sahu Ramchandra's case* authoritatively decides that that view can no longer be maintained. Therefore joint-family property is *not property* which vests in the Court or Receiver under Sec. 28. See also *Raja Brij Narain v. Mangla Prasad*, 46 M. L. J. 23 P. C. : 28 C. W. N. 253: 21 A. L. J. 934, But in *Amolak Chand v. Mansuk Rai Mangalal*, I. L. R. 3 Pat. 857, the Patna High Court dissented from the above view in *Sant Prasad v. Sheo Dutt Singh*, and *Sahay Narain v. Wajed Hossain*, and has now held that where the father of a joint-Hindu family and his two major sons engaged in business which proved unsuccessful and they were adjudged insolvents and a Receiver was appointed, not only their shares but also the shares of the minor sons vested in the Receiver, and that ancestral property is '*property*' within the meaning of Sec. 2 (1) (d) and is liable to be sold in satisfaction of antecedent debts.

Contrary view of the Privy Council.—The Privy Council, however, in the recent case of *Sat Narain v. Behari Lal*, 51 I. A. 22: I. L. R. 6 Lahore 1: 47 M. L. J. 857: 1925 A. I. R. (P.C.). 18, in appeal from the Full Bench case of *Behari Lal v. Sat Narain*, I. L. R. 3 Lahore 329, has held, contrary to the long cherished views of the Indian High Courts, that "it is well established law that in families governed by the law of the Mitakshara no co-parcener has in the joint-family property any separate and defined share, although in Northern India at best a co-parcener of such joint-family property has a right to obtain parti-

tion. A creditor of a co-parcenaar may, under certain circumstances, obtain a partition of his debtor's share in joint-family property and when in execution of a decree a court sells what is joint-family property as the property of the judgment-debtor, the purchaser at the court sale may under certain circumstances obtain a good title to what he purchases. But the property of an insolvent, which by Sec. 17 of the Presidency Towns Insolvency Act, Sec. 28 (2) of the Prov. Insolvency Act, vests in the Receiver must mean the property which is divisible amongst his creditors. *It is wrong to say that when a Hindu happens with his sons to constitute a joint family subject to the law of the Mitakshara, is adjudged insolvent, not only his own rights but all the rights and interests of his sons who are his co-parceners in the joint-family property vests in the Receiver by virtue of the adjudication alone.* It is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property, and from the female members their right to maintenance, and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property, and Sec. 2 (1) (d) contemplates absolute and unconditional power of disposal."

Hindu Family Firm.—Where one of 5 brothers representing a Hindu family firm was adjudged insolvent and the others were minors and it was further directed that the entire family property including the shares of the minor brothers should vest in the Official Receiver, held that the direction as to the vesting of the shares of the minor brothers in the family trade and property was improper. *Sathirasayam Pillai v. Meenakshisundaram Iyer*, 14 L. W. 361.

In a joint family governed by the Dayabhaga School of Hindu Law and having an ancestral trade, the share of the minor is not liable for debts contracted for the purposes of a new business started by the *karta* or manager of the family. On adjudication in insolvency of the adult members, the minor's share does not vest in the Receiver. If, however, any of the new firm's assets get into the possession of the minor, the Receiver is entitled to realise them for the benefit of the general body of creditors, but an individual creditor cannot, in any event, realise those assets for his own benefit and without the Receiver as a party. *Sanyasi Charan v. Krishna Dhan*, 20 A. L. J. (P. C.) 409: 49 Cal. 560: 26 C. W. N. 954: 43 M. L. J. 410: 35 C. L. J. 498.

Partnership Assets.—*Vide* notes under Sec. 2 (1) d.

What is not 'Property.'—(1) *Trust Property.*—“The amendment in the definition of ‘property’ in Sec. 2 (d) makes it clear that trust property is not to be dealt with under the Act as property of the insolvent”—*Notes on Clauses.* Property held by the insolvent in trust does not vest in the Official Assignee, *In Re. Vardalacca Charri* 2 Mad. 15. Thus it does not include gold and sovereigns entrusted to a jeweller to be made into ornaments, *Raja Mulraju v. Official Assignee, Madras*, 2 M. L. W. 312: 17 M. L. T. 247: 1915 M. W. N 262: 28 M. L. J. 403: 29 Ind. Cas. 37.

(2) *Provident Fund.*—Under Sec. 4 of the Provident Funds Act as amended by Sec. 2 of the Provident Funds (Amendment) Act, 1903, a Railway Provident Fund of the insolvent is not liable to attachment at the instance of the creditor of the subscriber, *C. D. M. Hindley v. Joy-narain Marwari*, 24 C. W. N. 288. “By virtue of Sec. 4 of the Provident Funds Act, neither the Receiver nor the creditors of an insolvent have any right to money drawn by the insolvent from his compulsory deposit in a Railway Provident Fund,” *Nagindas Bhukhandas v. Ghelabhai Gulabdas*, 56 Ind. Cas. 450. A deposit in a Provident Fund, which so long as the subscriber was in service was a compulsory deposit within the meaning of Sec. 2 (4) of the Provident Fund Act and is not attachable by a creditor the moment the subscriber retires. *Devi Prasad v. Secretary of State*, 21 A. L. J. 454. The deposits of a Railway servant in the State Railway’s Provident Institution are compulsory deposits, and therefore, they are not attachable while he is in service or on his death, or on his retirement, under Sec. 47 of the Provident Funds Act. Similarly the subsequent accretions such as contributions, interest or increment to the original deposits are not attachable. *Secretary of State v. Rajkumar Mukherji*, 50 Cal. 347. Under Sec. 28 (5) of the Provincial Insolvency Act, V. of 1920, the only property which is exempted from the scope of adjudication is property of the insolvent which is exempted by any enactment from liability to attachment and sale in execution of decree. Hence the deposits in the Provident Fund being exempted by enactment from attachment are not ‘property’ and do not vest in the Receiver.

A deposit in General Provident Fund by an optional subscriber within the meaning of Rule 3 of the Rules regulating the General Provident Fund and which is not capable of withdrawal except under Rules 10, 15 & 18, is a compulsory deposit within the meaning of Sec. 2 of the Provident Fund Act 1897, as amended by Act IV of 1903, the

test being whether the money is payable on demand or at the option of the subscriber or depositor. Such a deposit is exempt from attachment. *Juggannath Thirans v. Taraprasanno*, I. L. R. 3 Patna 74.

(3) **Pensions.**—Under Sec. 4 of the Pensions Act XXVIII of 1871 political pensions are not attachable and therefore do not vest in the Receiver. *Harnam Das v. Faiyazi Begum*, 20 A. L. J. 172.

(4) **Agricultural Holdings.**—"Agricultural holdings being exempted from attachment do not vest in the Court and his dwelling house being also exempt from attachment does not vest in the Receiver," *Sagar Mall v. Rao Girraj Singh*, 39 All. 120: 14 A. L. J. 1031: 38 Ind. Cas. 171. Before ordering sale of occupancy holding of an insolvent the Court should have come to a decision that the holdings are transferable without the consent of the landlord, *Arman Sardar v. Sathkira Joint Stock Co., Ltd.*, 18 C. L. J. 564. Under the C. P. Tenancy Act occupancy tenancy rights are exempt from attachment and when the tenant is declared insolvent those rights do not vest in the Receiver, *Sitaram v. Shaikh Sardar*, 13 N. L. R. 215. "When a mortgage has been executed by a member of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act, 1903, apply in contravention of that Act, even a decree passed in a suit for sale and a sale in execution following thereon cannot pass a good title in the mortgaged property to the auction-purchaser; nor does it make any difference that after the passing of the decree the judgment-debtor has become insolvent, because under the terms of the Act the mortgaged property does not vest in the Receiver in insolvency and cannot therefore be sold by him," *Hanuman Prosad Narain Singh v. Harakh Narain*, 42 All. 142: 58 Ind. Cas. 551. The provisions of the Provincial Insolvency Act cannot or do not apply to any suit or proceeding under the Agra Tenancy Act and there is no bar in the Insolvency Act to a suit against an occupancy tenant who has been declared insolvent for recovery of arrears of rent of an occupancy holding; and such holding cannot be dealt with by an Insolvency Court, *Kalku Das v. Gajju Singh*, 43 All. 510 F. B.: 19 A. L. J. 439: 62 Ind. Cas. 897, overruling *Raghubir Singh v. Ram Chunder*, 8 A. L. J. 1287. See also *Parbati v. Shyamrikh*, 44 All. 296: *Lala Govindram v. Kunj Behari*, 83 Ind. Cas. 808. Where a malguzar having *Sir* land is declared insolvent his proprietary rights in the *Sir* land vest in the Insolvency Court, but the occupancy rights which he acquires under Sec. 49 of the C. P. Tenancy Act do not vest in the Insolvency Court, and the latter has no jurisdiction whatever over them. No one but the proprietor of the *Sir* land can

divest him of his occupancy rights therein. *Sri Kishan v. Nagoba*, 76 Ind. Cas. 634.

(8) **Reversioner's Interest.**—The contingent interest of a reversioner to succeed after the death of a Hindu widow does not vest in the Official Assignee, *Anoji v. Rutanji*, 21 Bom. 313.

(6) **Bare Right to Sue.**—The word property under the English Insolvency law includes claims in the nature of damages which have accrued due prior to the date of insolvency except such as arise from bodily or mental suffering or personal inconvenience of the bankrupt or from injury to his person or reputation. Any property or interest in property which a person can in law or in equity transfer or assign or dispose of *inter vivos* by testamentary instrument, can be affected by him with a trust provided the object of the trust is lawful. A claim for breach of contract which has become due to the insolvent prior to insolvency and has not been paid to him vests in the Receiver. *Motiram Daulatram v. Pahlaj Rai*, 80 Ind. 141: 1925 A. I. R. (S.) 159.

Shall vest.—"Sec. 18 (2), now Sec. 56 (1), of the Provincial Insolvency Act contemplates on every adjudication of insolvency an order by the Court appointing Receiver for the insolvent's estate and without such an order the estate does not vest in the Official Receiver under Sec. 19 (2) now Sec. 57. Hence a sale of the estate by the Official Receiver without such an order does not give the vendee any title," *Muthuswami Sramiar v. Samoo Kandiar*, 43 Mad. 869: 39 M. L. J. 438. But if the Court subsequently passes an order vesting the property in the Receiver, the vendor's title to the property becomes complete either on the principle of ratification or under S. 43 of the Transfer of Property Act. *Narasimulu v. Basav Sankaram*, (1925) A. I. R. (M.) 249. "The effect of sub-secs. (2) and (6) of S. 16, corresponding to sub-sections (5) and (7) of the present Act is that, while no vesting of the property of the insolvent in the Receiver takes place until an order of adjudication is made and it is the order of adjudication which vests the property, nevertheless, by legal fiction, the vesting of the property of the insolvent in the Receiver must be deemed to have taken place, when once an order of adjudication has been made, at the date of the presentation of the petition or, in other words, the commencement of the insolvency. It follows therefore, that the insolvent cannot make a valid alienation of his property between the dates of the presentation of the petition and the order of adjudication,

Sheonath Singh v. Munsu Ram, 42 All. 433: 55 Ind. Cas. 941: 18 A. L. J. 449. Under Sec. 16, now 28, of the Provincial Insolvency Act, a Court making the order of adjudication is vested with the whole of the property of the insolvent and no creditor to whom the insolvent is indebted in respect of any debt provable under the Insolvency Act has any remedy against the property of the insolvent in respect of the debt, nor can he commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose. The permission of a Court to sue an insolvent under Sec. 16, now Sec. 28, is contingent on the suit being brought and cannot be given afterwards, and the proceedings started without such permission are *ultra vires* and do not constitute *res judicata*, *Trimbak v. Sheoram*, 65 Ind. Cas. 941. The property of the insolvent though situated in a foreign country vests in the Court under Sec. 16 (2), now 28 (2), of the Provincial Insolvency Act, *Draupadi Bai v. Govind Singh*, 65 Ind. Cas. 334.

Suits and Appeals by the Insolvent.—As regards the right of action of an undischarged insolvent to sue, the general rule is that the right, except for personal injuries and the like, passes to the trustee, but even where the rights pass to the trustee, the bankrupt might sue, the amount recovered being subject to the rights of the trustee to claim the proceeds. So it was held in *Wadling v. Oliphant*, (1875) 1 Q. B. D. 145, that a bankrupt may sue for rent due, and in *Buchan v. Hill*, (1888) W. N. 233, that he may sue for partnership accounts. Having regard to the provisions of Sec. 47 of the present English Bankruptcy Act there can be no doubt that the bankrupt has the right to maintain an action in respect of property of every kind, subject to the intervention of the trustee. In an action against a Bank by a trading customer who had become bankrupt and his trustee in bankruptcy for damages for breach of contract the jury found that the Bank had agreed with the customer to supervise the financial side of his business during his absence on military service and to take all reasonable steps to maintain his credit and reputation, had by its negligence in the discharge of his duties under this agreement caused the bankruptcy of the customer. Held, "that the right to claim damages for the injury to the bankrupt's credit and reputation did not pass to the trustee in bankruptcy but remained in the bankrupt," *Wilson v. United Counties Bank, Ltd.*, L. R. 1920 App. Cas. 102.

Conflict of Authorities in India.—In India there has been some conflict of opinion. In *Kristo Komul v. Sures Chandra*, 8 Cal. 556: 12 C. L. R.

253, it was held that a prior purchaser from an undischarged insolvent of the latter's share in immovable property was entitled to recover from the subsequent purchaser from the official Assignee. A contrary view seems to have been taken in *Rawlandson v. Champion*, 17 Mad. 21 and in *A. B. Miller v. Abinas Chandra*, 2 C. W. N. 372. Again *Rawlandson's* case was distinguished in *Sriramulu v. Andalmal*, 30 Mad. 140: 17 M. L. J. 14, and the rule laid down in *Kristo Komul's* case was approved. Finally in the Patna High Court it was held in *Khelaftut Hossain v. Ajmal Hossain*, 54 Ind. Cas. 699, that a person who has been declared an insolvent cannot, while his estate is in the hands of the Receiver, maintain a suit in his own name, even though the Receiver has refused to bring such a suit. But *Umar Bahadur v. Khwaja Muhammad*, 79 Ind. Cas. 56: 1924 A. I. R. 667 (Patna) does not decide this point, though the opinion expressed by Mullick, J., therein is in favour of supporting the right of an insolvent to bring an action in his own name.

In *Konda Pillai v. Diduvant Ramchandra*, 13 L. W. 616: 1921 M. W. N. 535: 62 Ind. Cas. 854, it has been held that though there are words which may be read as making insolvency equivalent to civil death of the insolvent and taking away his common law rights of action, still for protecting the rights of creditors in an insolvent's property, the insolvency of a judgment-debtor does not render it incompetent for him to continue the proceedings by suit or by way of appeal. It does not follow that the insolvent has no *locus standi* in filing an appeal against a decree or order passed against him.

Suits and Appeals against the Insolvent.—A creditor of an insolvent has no remedy against his property in respect of the debt other than that provided by Sec. 28 of the Act. *Seth Sheolal v. Girdhari Lal*, 78 Ind. Cas. 140. It should be noted that the word 'debt' used in Sec. 28 (2) is debt provable under this Act. A debt or liability incurred by an insolvent after the order of adjudication is not provable under the Insolvency Act. The jurisdiction of a Civil Court to entertain a suit in respect of such a debt or liability is not barred by the Provincial Insolvency Act so as to oust the jurisdiction which vests in a Civil Court, to try all suits of a civil nature under Sec. 9 C. P. Code. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under the Act. *Hiralal v. Tulsiram*, 80 Ind. Cas. 946: 1925 A. I. R. (Nag.) 77.

Leave of the Court.—"Sec. 16 has been enacted for the purpose of enabling the Court to keep a proper control over the administration of the estate in the insolvency proceedings. After a judgment-debtor has been adjudicated insolvent the decree-holder has no longer the right to attach his property or to sue for declaration in respect of it without the leave of the Court." *Louis Dreyfus v. Jan Muhomed*, 49 Ind. Cas. 421.

It will be noticed that the order of adjudication does not effect an absolute stay of suit against the insolvent but only makes it necessary that leave should be obtained from the Court, *Ramaswami Pillai v. Gobindaswami Naiker*, 42 Mad. 319: 25 M. L. T. 247: 49 Ind. Cas. 626. The Provincial Insolvency Act does not authorise an Insolvency Court to stay every pending litigation and the Court can only issue an injunction if the circumstances enumerated in Orders XXXIX r. 6, C. P. Code, or any of them prove to exist. It has no jurisdiction to issue an injunction upon a person who is not a party before it, *Ramsundar Rai v. Ram Dhyan Ram*, 3 P. L. J. 456: C. W. N. Pat (1918) 303: 5 P. L. W. 215: 46 Ind. Cas. 224. Sec. 28 (2) does not prohibit the continuance of the suit or application against the insolvent himself, nor does it contain such a prohibition. The section provides that after the making of an order of adjudication a creditor of the insolvent shall not during the pendency of the insolvency proceedings commence a suit or other legal proceeding without the leave of the Court, but not that a creditor cannot go on with a suit or other proceeding already pending at the date of adjudication. *Ashghari Begum v. Muhammad Yusoof*, 61 Ind. Cas. 534. Sec. 28 (2) does not contemplate the grant of permission by the Insolvency Court to continue a Civil Suit filed against an insolvent without such permission. Sec. 29 of the Act however contemplates not only a suit filed before an order of adjudication has been made but also one filed after the order, but in real ignorance of it. Therefore when a suit is filed against an insolvent in the Civil Court in ignorance of the adjudication order and consequently without the permission of the Insolvency Court, the Plaintiff cannot obtain permission of the Insolvency Court to continue the suit under Sec. 28 of the Act. *Haji Umar Shariff v. Jwala Prasad*, 79 Ind. Cas. 662. A firm was adjudged insolvent but no schedule of creditors as required by law was prepared nor was notice of the insolvency proceedings served upon all the creditors. One of the creditors brought a suit against the insolvents to recover the amount of his debts, but the suit was dismissed on the ground that no leave was

obtained from the Court under Sec. 16, now 28, of the Act. Held, that the insolvency proceedings were no bar to the suit, *Des Raj v. Duni Chand*, 60 Ind. Cas. 588. An application under r. 6 Or. XXXIV C. P. C. for a personal decree against a mortgagor is not a new proceeding but a continuation of the original suit and does not come under the bar of Sec. 16, now Sec. 28 of the Provincial Insolvency Act. The issue of a personal decree against a mortgagor is not the grant to the mortgagee of a remedy against the mortgagor within the meaning of Sec. 16 now Sec. 28, *Kishan Chand v. Sohan Lal*, 2 Lahore 95: 59 Ind. Cas. 710. The obtaining of leave is a matter between the Receiver and the Court whose officer he is, and the fact that the leave of the Insolvency Court has not been obtained is not a valid defence which a defendant can raise to a suit by the Official Receiver without leave of the Court. *The Official Receiver, Coimbatore v. D. D. Kanga*. 14 L. W. 655: 1921 M. W. N. 858 following *In Re. Branson* 1914 2 K. B. 701.

The leave contemplated in this section is a leave which ought to be obtained before commencement of a suit and cannot be granted after the same is filed, *In Re. Dwarkadoss*, 17 Bom. L. R. 925.

"Shall."— A decree-holder in respect of whose judgment-debt an order declaring him insolvent and appointing a Receiver has been passed cannot *pari passu* with the proceedings in insolvency go on executing his decree in the ordinary way against the judgment-debtor, *Gouri Dutt v. Shanker Lal*, 14 All 358.

Pendency.—An insolvency proceeding will be considered as pending where the Receiver has not yet been discharged and the insolvent has not applied for and obtained his discharge, *Jeevanji Mamooji v. Ghulam Hussain*, 12 S. L. R. 20: 47 Ind. Cas. 771.

The words "during the pendency of the insolvency proceeding" being placed after the word "shall" and in immediate conjunction with the words "have any remedy against the property of the insolvent" appear to be limited in operation to that provision beginning with the words "or shall" and relating to the commencement of a suit. The provision as to the commencement was treated as governed by the words "during the pendency of the insolvency proceeding." *In Re. Dwarkadass* 17 Bom. L. R. 925: 40 Bom. 235. But the question as to when the insolvency proceeding ceases to be pending was not discussed in that case. And the point really decided was that a plaint filed without the previous leave of the Insolvency Court, even if filed within the period of limitation for such a suit, could not be given retrospective

effect as a suit commenced within the period of limitation by an order of the Insolvency Court, granting such leave if made after the suit had become barred by limitation. The primary operation of the words "during the pendency of the insolvency proceedings" is to govern a provision barring the existence or continuance of remedies on the part of a creditor against the property of the insolvent. One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors, and it must often occur that valuable estates are still in the hands of the Receiver, and in process of realisation for that purpose at the date when the insolvent applies for his final discharge. That being so, it appears to be inconceivable that the Legislature could have intended that any individual unsecured creditor could have the uncontrolled right to attach and in execution realise any monies or property of the insolvent in possession of the Receiver or that he should have the uncontrolled right to enforce such remedies against property still remaining in the possession of the insolvent or any other person in trust for the insolvent. For these reasons, one would not be justified in adopting a construction limiting the operation of the provisions to the period prior to the order of the Insolvency Court granting or refusing discharge of the insolvent. *Rowe & Co. v. Tanthean Taik*, 1 L. R. 2 Rang. 643: 84 Ind. Cas. 909. The refusal of discharge to an insolvent is not necessarily a determination of the insolvency proceedings, and in spite of such refusal, the bar against the commencement of a suit against the insolvent after the adjudication order laid down by Sec. 28 (2) continues to operate, and a creditor of an insolvent is not entitled to commence a suit for the recovery of a debt against the insolvent without leave of the Insolvency Court. The plaint in such a suit must be rejected.

Sub-section (3).—The property of the bankrupt comprises all goods which at the date of the presentation of the petition were in the order and disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that the insolvent is the reputed owner thereof. See Sec. 44 (iii) of the Bankruptcy Act, 1883. This provision is directed against a false credit obtained by a person carrying on a trade or business from the visible possession of property to which he is entitled, *Fresency v. Wells* 1857 26 L. J. C. P. 129. And its effect is to transfer to the Receiver certain property which does not belong to the insolvent or in which he has only a qualified interest.

In order that property may come within this provision the following conditions must be satisfied :—

(1) The insolvent must be carrying on a regular trade or business.

(2) The property must be goods i.e., personal chattels or choses in action and debts due or growing due to the insolvent in the course of his business or trade, *Colonial Bank v. Whitney* 1895 30 Ch. D. 261. No interest in lands is within the reputed ownership clause, but if land and personal chattels are leased together, e.g., a furnished house or land with machinery standing thereon as one subject matter and at one entire rent, and the receiver disclaims the lease he cannot claim the chattels under the doctrine of reputed ownership, *Eccarte Allen, Re. Fussell* 1882 20 Ch. D. 341. And therefore fixtures are not within it, *Horn v. Baker*, 1808, 2 Smith's Leading Cases 11th Ed., 232.

(3) The goods or debts must be in the possession or in the order and disposition of the insolvent or his agent by the consent and permission of the true owner, *Joy v. Campbell* 1804 1 Sch. & Lef. 328. But if the bankrupt is a trustee and the goods are trust property the reputed ownership clause has no application, *Joy v. Campbell, supra*. See also *Watkins v. Customs* L. R. 8 Ch. App. 520.

True Owner and Reputed Owner.—The principle that a person who is under an obligation to convey property to another is in a Court of Equity a trustee of such property for the latter, does not apply in cases where the reputed ownership clause of the Insolvency Act is in question. Hence where certain shares belonging to a debtor were transferred to another person without any deed of transfer and without giving any notice to the company it was held that these shares and the right to receive any distribution of assets in respect of them vested, upon his insolvency, in the Official Assignee, *Bhavan Mulji v. Kavasji*, 2 Bom. 542, followed in *Puninthavelu v. Bhasyam*, 25 Mad. 406 where it was pointed out that the term 'true owner' in the Indian Insolvency Act included equitable owner as well as legal owner. Thus if the insolvent assigns a debt and if the assignee gives notice of the assignment to the person owing the debt the notice by the assignee will take the debt out of the order and disposition of the insolvent, *Ibid*. If the property be in the actual possession and reputed ownership of the debtor it will not cease to be regarded as his property simply because the true owner has kept a guard over it, *In Re. Brown*, 12 Cal. 629. See also *Macleod v. Kikabhoy*, 25 Bom. 659, *In Re. Dwarka Nath Mitter*, 3 Cal. 58, *In Re. Marshall*, 7 Cal. 421, *In Re. Gubbay Miller*, 6 Cal. 633; 7 B. I. R. 29. It has also been held in *Moti Ram v. E. H.*

Rodwell, 21 A. L. J. 32: 1923 A. I. R. 159 (Allahabad) that Sub-section 6 is as clear as it can possibly be and provides unambiguously that no property over which a secured creditor has a legal charge shall be affected by any of the provisions of sub-section 3 which precede it. If the Receiver realises the property, the debt due to the secured creditor at the date of realisation, constitutes a charge payable to the creditor out of the amount so realised. But in a recent case *Shamaldas Kshettry v. Phanindranath*, 1923 A. I. R. 532 Cal.: 73 Ind. Cas. 467, a trader entered into an agreement with certain bankers under which the latter was to make advances on the security of his jute kept in his godown. The arrangement was that the key of the godown was to be kept with the bankers, but that the trader was to do the buying and selling *independently* and to have the delivery of the jute. The trader was subsequently declared insolvent and the bankers claimed to be 'secured creditors' in respect of the jute which lay in his godown. *Held* that though by the law in England it is true that a mortgagee is the true owner and where he allows the mortgagor to be in possession of the goods mortgaged, the principle of reputed ownership has been applied, the question is whether this principle is applicable to a case having regard to the provisions of Sec. 28 (6) of the Provincial Insolvency Act. "If a secured creditor can proceed to realise his security or deal with it in the same manner as he would have been entitled to do, had Sec. 28 not been passed, we do not see how the reputed ownership clause in sub-section 3 of section 28 can have any operation. It may be said that this interpretation of this section would be against the spirit and object of the reputed ownership clause in sub-section 3 of section 28. But having regard to the express terms of clause (6) of the section we are bound to give effect to the provisions of that sub-section 6." The law, however, has been clearly enunciated in *Re. Kaufman Segal v. Domb, Ex parte, The Trustee*, (1923) 2 Ch. D. 89 by P. O. Lawrence, J. in the following terms "The Respondent in this case has two points. The first is that there is a general *custom* of hiring out articles of furniture so as to prevent the inference by the public that these articles, although in the possession of the bankrupt, were the bankrupt's own property. The second point is that apart from custom the chattels were in possession of the bankrupts in circumstances which did not necessarily involve the inference that they were the property of the bankrupts. As regards the first point, reliance was placed upon *Ex parte Emerson*, 41 L. J. (K. B.) 20. The trustee on the other hand relied on *In Re. Tabor* in which it was held

that the statement "that the public at large no longer attributes ownership of furniture to the persons who are in possession of it," is extravagant. As regards the second point the Court held that "the Court is bound to come to the conclusion that the inference of ownership which would be drawn by the public is not merely one that "may or may not" arise but is one that *must* arise. In the absence of any general custom as to the hiring, the inference which a reasonable man would necessarily draw from the fact that the articles in question were in possession of the bankrupts and were being used by them in their trade is that the articles belonged to the bankrupts, and the inference so drawn is an inference which, within the meaning of Vaughan Williams L. J.'s statement of the law, *must* arise."

It should be noted that Sec. 28 (6) refers to the rights of secured creditors *in general*, and that Sec. 28 (3) is an *exception* to that general rule, applicable only to secured creditors of *goods, in trade or business*, where the goods are allowed to be in the order or disposition of the bankrupt in such circumstances which give rise to the irresistible inference in the minds of the public that the goods belong to the insolvent. Sec. 28 (6) therefore must be read subject to Sec. 28 (3), and it is not correct to say that Sec. 28 (3) has no operation in view of the provision contained in Sec. 28 (6).

Matters to be Proved.—The words 'true owner' include the owner of an equitable interest and that there can also be a reputed owner of that interest and that *reputed* owner can be the insolvent himself, i.e., the *legal* owner of the property. *Mercantile Bank of India v. Official Assignee, Madras*, 39 Mad. 250, following the judgment of Bhashyam Aiyangar, J. in *Puninathavelu v. Bhashyam*, 25 Mad. 406. In *Colonial Bank v. Whitney* (1886) A. C. 426 it was held that where there was an equitable mortgage of shares by the deposit of the share certificates and a blank transfer, the registered shareholder remaining the legal owner, the depositor got an equitable interest and that another person could be the reputed owner of that equitable interest. The result is that in the case of a garnishee, he must be taken to be the true owner of the equitable interest in a motor car. But the car being left in the possession of the insolvent with power to use it to all appearances, though it were his own, he had become the reputed owner. *It is essential for the section to apply that he should at the commencement of the insolvency be the reputed owner with the consent of the true owner.* Now the question is whether the true owner was at that time consenting or

not to the reputation of ownership to the reputed owner and that is a question of fact. If before the commencement of the insolvency of the pledgor, the pledgee puts an end to the right of the pledgor to use the thing pledged by demanding its return according to agreement, the thing pledged cannot thereafter be said to be in possession with the consent of the true owner. A letter proved to have been passed to the proper address of a person must be presumed to have reached him in the absence of evidence to the contrary. *Aburrahammal v. Official Assignee, Madras*, 47 Mad. 215.

Hire Purchase System.—"Sec. 28 (3) is Sec. 38 (c) of the English Bankruptcy Act, 1914. In *Lamb v. Wright & Co.* (1924) 1 K. B. 857 an insolvent purchased a *pleasure motor-car* from the plaintiffs on hire and purchase system. After he got possession of the car in question the insolvent used it from time to time *in his trade or business*. It was plain (1) that the car was at the commencement of bankruptcy in the possession of the bankrupt, (2) that the possession was with the consent and permission of the true owner, (3) that the car was used with considerable frequency in the trade or business of the bankrupt. Does the Section require, ere a trustee can claim, that the consent or permission of the true owner of goods be given not only to the possession by the bankrupt but also to their user in his trade or business? If this full measure of consent be required, then the defendant here, on behalf of the trustee, fail in their defence. For it is plain that the plaintiff did not consent to the car being used in the bankrupt's trade or business, but that he was not aware that it was so used. *The section requires the full consent*. The section is limited in its operation to goods in the trade or business of the bankrupt. It does not apply to domestic articles of furniture in a bankrupt's private dwelling. If a man consents to the user of his goods in the trade or business of another, he knows, or ought to know, that he runs a risk of losing those goods by operation of Sec. 38. But if he only consents to the use of those goods for private and non-business purposes, then is he exposed to the confiscatory provision of Sec. 38, merely because the bankrupt without his knowledge, had used those goods in and for his trade or business. In *Colonial Bank v. Whitney*, 30 Ch. D. 261, Cotton L. J. said "I think the true construction is the goods must be in his (bankrupt's) order or disposition for the purposes of or purposes connected with trade or business." Lindley L. J. said "the language "*in his trade or business*" means not merely visibly employed in his trade or business but acquired for the purposes

of the business and used for those purposes." It would seem to follow from these dicta that if a motor car be acquired for private use and be primarily employed for private purposes, then it cannot be said to be a car in the "trade or business" of the bankrupt.

Sub-sections (4). After-acquired properties.—Sub-section (4) lays down that the properties acquired by the insolvent between the order of adjudication and discharge form the property of the insolvent and the Receiver is entitled to take possession of the same. The word *property* does not exclude personal earnings over and above what is necessary for the debtor's support and the Court has jurisdiction to pass orders as to his earnings after adjudication but before his discharge, *Jumnadas v. Vinayak*, 10 Ind. Cas. 698: 7 N. L. R. 19. If the mortgage is an assignment of the after-acquired property and the mortgagee acquires the property before bankruptcy then the mortgagee's title is good as against the Receiver, *Tailhie v. Official Receiver* 1883 13 A. C. 523. But if the property does not fall into the possession of the bankrupt until after bankruptcy then the mortgagee has no right to the property. Thus if a debt to fall due at a future date is assigned and the debt only falls due after bankruptcy the assignee has no right to it, *Ex parte Hall, Re. Whitting* 1870 10 Ch. D. 615. On the other hand debts due at the date of the assignment but payable at a future time may be validly assigned and if they become payable after bankruptcy they will none the less belong to the assignee and not to the Receiver, *Ex parte Moss Re. Toward* 1884 14 Q. B. D. 310. A mere license to seize chattels as a security for a debt is determinable in bankruptcy since the effect of bankruptcy is to bar the right to enforce the debt in such a case, *Thomson v. Cohen*, 1872 L. R. 7 Q. B. 527. See also *Hasluck v. Clark*, (1899) 1 Q. B. 699; *In Re. Sargeant*, (1923) 2 Ch. D. 302.

The Receiver has a right to the subsequently acquired property of an insolvent but the right is subject to 2 qualifications:—(1) if the insolvent has acquired the property subject to liens and obligations then any property taken by the Official Assignee under that state of things is taken subject to those charges and equities and (2) if the insolvent carries on trade at a subsequent period with the assent of the Assignee of the estate under the Insolvent Act in the first instance, the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade in priority to the claim of the Official Assignee under the first insolvency, *Kerakoose v. Benjamin Brookes*, 14 M. I. A. 330, *Kristo Comul v. Suresh*

Chander, 8 Cal. 556: 13 C. L. R. 253, *Fatima v. Fatima*, 16 Bom. 452, following *Hubert v. Sayer*, 5 Q. B. 965, *Abdul Karim v. Official Assignee*, 8 Mad. 168, *Rowlandson v. Champion*, 17 Mad. 21. •

The sums paid into a bank by a bankrupt after the date of the receiving order become the property of the Trustee in bankruptcy and that the bank were not entitled to credit themselves with the payments made to the bankrupt, as those transactions took place after the date of the receiving order and therefore not protected. *In Re. Wigzell, Ex parte Hart*, 1921 2 K. B. 835.

In *Macleod v. B. B. & C. I. Ry. Co.*, 7 Bom. L. R. 618 (reversing 6 Bom. L. R. 337) an employee in the defendant company, an insolvent, was entitled to a certain sum contributed by him towards the Provident Fund subsequent to his insolvency. The company was held to have no authority to pay the money to him after receiving a letter from the Official Assignee. But see *C. D. M. Hindley v. Joy Narain Marwari*, 24 C. W. N. 288, and notes under Provident Fund *supra*.

An agreement by which a scheduled creditor accepts a present cash payment and a promise of future payment in settlement of the debt from an undischarged insolvent not shown to have carried on any trade or business and without the knowledge and assent of the Official Assignee, was held to be not enforceable and neither the second qualification mentioned in *Kerakoose v. Brookes* nor the principle laid down in *Cohen v. Mitchell* was held applicable, *Naoraji v. Kazi Siddiq Mirza*, 20 Bom. 636.

A mortgage of subsequently acquired property by an undischarged insolvent was held to be invalid against the Official Assignee who took the property free from *incumbrances*, *Rowlandson v. Champion*, 17 Mad. 21. In *Sriramulu Naidu v. Andalamal*, 30 Mad. 145: 17 M. L. J. 14 (17 Mad. referred to) an undischarged insolvent was held entitled to recover certain immoveable property which he became entitled to by inheritance. "No doubt the rule formulated in *Cohen v. Mitchell* does not extend to such an interest. But here there is no question of any contract or transfer by the insolvent relating to his after-acquired immoveable property." The property moveable or immoveable acquired by the insolvent after adjudication but before final discharge can be transferred by him provided it is *bonafide* and for value, *Ali Muhammed v. Vadi Lal*, 21 Bom. L. R. 849.

Mahomedan Law.—"It is an established principle of Mahomedan Law that when the consent of the heirs of a Mahomedan to a bequest in a will in favour of an heir has been signified the legatee takes from the testator and the consent does not operate as a transfer by the heirs of a right which has in the meantime vested in them. There may be perhaps some conflict between this principle of Mahomedan Law and the strict wording of Sec. 16 (4), now Sec. 28 (4) of the Insolvency Act, but we think the principle of Mahomedan Law ought to be applied and that such consent would not be affected by the fact of the consenting heirs being insolvents," *Aziz-un-nissa Bibi v. O. M. Chiene*, 42 All. 593. All properties such as may be acquired by, or have devolved upon, the insolvent after passing of an order of adjudication and before his discharge, forthwith vests in the Court or Receiver, and becomes divisible amongst the creditors. *Muhammad Fatima v. Muhammad Mashuq Ali*, 44 All. 617: 20 A. L. J. 569. As regards the right of action of an undischarged insolvent to sue for a share of a dower debt due to his daughter from her husband, it was held that the general rule is that the right except for personal injuries and the like pass to the trustee; but even where the right passes to the trustee, the bankrupt might sue, the amount recovered being subject to the right of the trustee to claim the proceeds. *Omar Bahadur v. Khaja Muhammed*, 79 Ind. Cas. 56: 1924 A. I. R. Pat. 667.

Difference between the properties mentioned in Sec. 28 (2) and Sec. 28 (4).—The difference between the bankrupt's estate which vests in the trustee in bankruptcy and after-acquired property, which also vests on acquisition, is that the bankrupt can deal with latter until the trustee intervenes. If he sues in respect of an after-acquired chose-in-action he can obtain a decree, and if the decree is satisfied before the trustee intervenes, the judgment-debtor obtains a good discharge. The question then remains between the trustee and the bankrupt if the after-acquisition is discovered. In other words, persons who deal with an undischarged insolvent, in good faith, for value, with regard to after-acquired property are protected. *Cohen v. Mitchell*, (1890) 25 Q. B. D. 262. *Chote Lal v. Kedar Nath*, 84 Ind. Cas. 289, *Kuppu Ramunatha v. Nagindra*, 18 L. W. 868: 45 M. L. J. 827: 1924 A. I. R. (Mad.) 223: 76 Ind. Cas. 805. It is otherwise with regard to property which actually vests in the trustee at the date of adjudication order. Whether or not the defendant knew that he had no right to sue for the money he said he had advanced to the plaintiffs seems immaterial. He must be taken

to have known that his outstandings pass to the Official Assignee. It is quite clear that unless the adjudication order is annulled the insolvent cannot execute the decree. A suit will lie to set aside a decree obtained by fraud. *Andrew Rozario v. Muhammad Ebrahim Serung*, 48 Bom. 583: 26 Bom. L. R. 695.

Insolvent's right of suit regarding after-acquired properties.—In *Ramanath Iyer v. Nagendra Iyer*, 45 M. L. J. 827, the question arose whether in the case of after-acquired property the insolvent is entirely barred from maintaining any suit in respect of it and whether the Receiver alone can sue. It was contended that because under Sec. 28 (2) and 28 (4) all the properties, including the after-acquired property of the insolvent, vested in the Receiver therefore no right rested in the insolvent himself and he is not entitled to maintain a suit. Following *Sriramulu v. Andalumul*, 30 Mad. 145: 17 M. L. J. 14, it was held that in the case of after-acquired property the insolvent *has a right to maintain a suit* subject to the intervention by the Official Receiver or the Official Assignee, and that if the Official Receiver or the Official Assignee did not intervene the insolvent was entitled to go on with the suit.

Sub-section (5).—This sub-section is an exception to sub-section (4). All properties of the insolvent acquired both before and after the order of adjudication vest in the Receiver subject to certain exception, viz., excepting those properties that are excluded from attachment under Sec. 60 of the C. P. C. Thus the Provident Fund being excluded from attachment under Sec. 60 of the C. P. C. is not attachable and therefore does not vest in the Receiver. *C. D. M. Hindly v. Joy Narain Marwari*, 24 C. W. N. 288, *Jagannath Therans v. Taraprasanna*, I. L. R. 3 Pat. 74.

Under this sub-section the only property of the insolvent which is exempted from the scope of adjudication is property of the insolvent which is exempted by any enactment from liability to attachment and sale in execution of a decree. The share in a joint family property is not saved from such attachment and sale and therefore not outside

For Agricultural Holdings. Trust Property Joint-Family Property &c.—See notes under Section 2 (1) (d) and 28 (8) *Supra*.

Sub-section (6). "Secured Creditor."—“Sub-section (6) provides unambiguously that no property over which a secured-creditor has a legal charge shall be affected by any of the provisions contained in the

Sub-sections which precede it. Sec. 47 lays down the procedure to be adopted by a secured creditor, but his rights under the section must necessarily be postponed, when the legality of the charge is questioned." *Moti Ram v. Rodwell*, 21 A. L. J. 32: 1923 A. I. R. (All.) 159.

For what constitutes a secured creditor *vide* notes under Sec. 2 (1) *supra*.

The right of the secured creditor to realise or otherwise deal with his security is unaffected by the presentation of a bankruptcy petition or the making of the receiving order, Sec. 9 (2) of the Bankruptcy Act, 1883. Thus the Court has no jurisdiction to restrain a mortgagee of the bankrupt's property from selling the property, *Re. Evelin, Ex parte General Public Works and Assets Co.*, 1894 2 Q. B. 302; nor will it restrain a mortgagee from proceeding with a suit to enforce his mortgage, *Ex parte Hirst, Re. Wherly* 1879 11 Ch. D. 278. A mortgagee of the land who gains possession even after bankruptcy is entitled as against those claiming under the bankruptcy to the crop growing on the land, as against the Official Receiver to the possession of the land, *Re. Grodon, Ex parte Official Receiver* 1889 6 Morr. 115.

Is Receiver a Necessary Party in a Mortgage Suit.—Where a person prior to being adjudicated insolvent executes a mortgage, the mortgagee as a secured creditor has, by reason of Sec. 28 (6), a right to proceed with a suit upon the mortgage and to realise his security in spite of the fact that the equity of redemption has vested in the Receiver who has no right to transfer the property free of the claim of the mortgagee. In view of the words "*in the same manner*" in Sec. 28 (6) it was doubted as to whether the Receiver was a necessary party. *Mohammad Muniruddin Khan v. Mahmud Buksh*, 63 Ind. Cas. 91. The point has been finally settled by the decision in *Jagannath Marwari v. Kalachand Bannerjee*, 41 C. L. J. 290, in which it was contended that in a mortgage suit, all persons having an interest in the equity of redemption must be made parties, and as the right of the insolvent vested in the Receiver he was a necessary party. Under Sec. 58 of the Act, the interest of the insolvent vests in the Court where no Receiver is appointed. Can it be said that the mortgagee was bound to sue the Court in order to enforce the mortgage? That would be clearly absurd. The reasonable construction of Sec. 28 (6) must, therefore, be that a secured creditor is not in any way affected by the other provisions of that section and *for the purpose of enforcing his mortgage, it should be held that the title to the property remained with the mortgagor.*

His Rights.—“ It is well-established that a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors. The position of a secured creditor is dealt with Sec. 28 (6) and Sec. 47 of the Provincial Insolvency Act. Sec. 28 (6) is very emphatic in providing that the provisions of the Provincial Insolvency Act should not in the least touch a secured creditor who is entitled to realise or deal with his security in any way he chooses, unhampered by the provisions of the Povincial Insolvency Act. Speaking broadly, under Sec. 47, a secured creditor may do one of the three things; he may enforce his security and prove for the balance that may be due to him; or he may relinquish his security for the general body of creditors and prove for the whole debt that may be due to him; or he may value his security and receive a dividend for the balance that may be due to him subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether in which case he must be content with his security and will be debarred from claiming any dividend if his security should prove insufficient.” *Sant Prasad Singh v. Sheo Dutt Sing*, 1. L. R. 2 Patna, 724. Where any part of the insolvent's property is subject to a mortgage, the value of the insolvent's right to redeem that property can only be his assets available for distribution. *Govindu v. Abdul Kadir*, 1923, A. I. R. 150 (Nag.) Only the property of the insolvent vests in the Official Receiver. The Act does not empower the latter to sell the former's estate free from encumbrances even with the consent of the mortgagee. Such a consent could not be implied merely from the absence of a reply by the mortgagee to a letter of the Official Receiver stating that he would sell the property free of the mortgage in case he did not reply. Held also that an unsuccessful attempt of the mortgagee in the insolvency jurisdiction to get cancelled the sale held by the Official Receiver free from encumbrances did not estop the mortgagee from thereafter filing a suit to enforce his mortgage. *Karniappa Mudaly v. Raju Chettiar*, 47 Mad. 605: 47 M. L. J. 16: 79 Ind. Cas. 850: 1924 A. I. R. (Mad.) 761.

“ A discharge does not affect the mortgage debt, and a Receiver as a condition of dealing with mortgaged property has in every case to pay off the mortgage, even when the mortgagee has not sought to be placed in the schedule, the position of the mortgagee being essentially different from that of the unsecured creditors” *Sridhar Narain v. Atmaram*, 7 Bom. 455. Held also in *Sridhar Narain v. Krishnaji*, 12 Bom. 272 that “ the only interest the insolvent had in the mort-

gaged premises was the equity of redemption and this having vested in the Receiver what passed to the purchaser was only the equity of redemption and nothing more, and he would be entitled to redeem the property. The mortgaged property could not be sold by the Receiver without the consent of the mortgagee or paying him off."

Raj Singh v. Gouri Sahay, 21 All. 227 it was held that a judgment creditor holding a decree for sale upon a mortgage against an insolvent judgment-debtor will not, by reason of his debt not having been scheduled in the insolvency proceeding lose his right to execute the decree, following *Harapriya Debya v. Shama Uharan Sen*, 16 Cal. 592, and *Sridhar v. Atmaram supra*. See also *Rain v. Bank of Bengal*, 5 C. W. N. 16, *Gopi Nath v. Guru Prashad*, 15 Ind. Cas. 860.

"It seems clear that in respect of properties which are subject to a mortgage or charge what vests in the Official Receiver upon an adjudication of insolvency and the making of a vesting order is the insolvent's equity of redemption which at the time constitutes the "whole of the property of the insolvent." in such items. This is the consequence of Clause (5) Sec. 16 corresponding to Clause (6) Sec. 28 of the present Act which preserves the right of secured creditors without affecting the Official Receiver's power to administer the encumbered estate" *Mokshagunam Subramania v. Ramakrishna Aiyar*, 42 M. L. J. 426. If the mortgagor becomes insolvent it is only the equity of redemption that vests in the Official Receiver, and if during the pendency of the insolvency proceedings, the mortgaged property is compulsorily acquired the mortgagee will be entitled to his mortgaged amount from the compensation received for the property acquired. *Purushottam Naidu v. Ramaswamy*, 1925 A. I. R. (Mad.) 245.

Is Clause (6) Controlled by Clause (2)?—Where a person prior to being adjudicated insolvent executes a mortgage, the mortgagee as a secured creditor has, by reason of Sec. 16 (5), now 28 (6), a right to proceed with a suit upon the mortgage and to realise his security in spite of the fact that the equity of redemption has vested in the Receiver, who has no right to transfer the property free of the claim of the mortgagee. In view of the words "in the same manner" in Sec. 28 (6) it was doubted whether the Receiver was a necessary party, *Mohammad Moniruddin v. Mahmood Baksh*, 63 Ind. Cas. 91, *Shiam Saroop v. Nand Ram*, 43 All 555: 19 A. L. J. 511: 63 Ind. Cas. 366. But in *Mokshagunam Subramania v. Ramakrishna Aiyar*, 42 M. L. J. 426 it was held that during the pendency of insolvency proceedings no creditor has any remedy against the property of the insolvent or may

commence any suit without the leave of the Court, Sec. 28 (2). Insolvency proceedings commence with the presentation of a petition. A suit commenced thereafter was irregular and the decree and subsequent execution proceedings *to which the Receiver was not a party did not bind him*. The debt due to the appellant was provable under the Act under Sec. 47 and therefore he could not claim immunity from the provisions of Sec. 28 of the Act. The appellant having only an equitable right under the provisions of Sec. 55 (4) of the T. P. Act to recover the purchase money from the property that he had sold did not obtain the status of a secured creditor until his right was declared by a decree of a court. The decree that he obtained cannot be pleaded in defence to a claim made by the Official Receiver or the Assignee from him. As pointed out in *Punithavela v. Bhashyam Aiyangar*, 25 Mad. 406, the Official Assignee or Receiver is not affected by the doctrine of *lis pendens*, and the party seeking to bind him by the result of the suit must apply to have him joined as a party to the suit under Or. XXII r. 10 of the C. P. C. The lien that he had should not in any case prevail against the title of a *bona fide* purchaser without notice and that the respondent's title is not affected by the proceedings taken by the appellant behind the back of the Official Receiver. *Mokshagunum v. Ramakrishna*, 42 M. L. J. 426.

C. and K. executed a mortgage on the 10th March 1908 in favour of B. They were declared insolvents on the 6th May 1912. On the 25th October 1912 after adjudication they executed a mortgage in favour of N. and with the money obtained thereby B. was paid off. The Receiver or the Court made no objection to the mortgage, but apparently accepted the position finding that the principal if not the sole creditor of the insolvent had been paid off thereby. N. sued on his mortgage on the 13th November 1917; and in that suit the heirs of K. raised the objection that the mortgage was invalid in view of Sec. 16 (2), now 28 (2). Held that the mortgage in suit, the consideration of which was utilised towards the discharge of a prior mortgage of the secured creditor was valid and enforceable. Held, also, that it was not open to the heirs of K. who were neither the creditors nor the insolvents nor in any way representing the Receiver to object to the validity of the mortgage on the basis of Sec. 16 (2) now 28 (2). *Shiam Saroop v. Nand Ram*, 43 All 555: 19 A. L. J. 511; 63 Ind. Cas. 366.

Is Clause (6) Controlled by Clause (3)?—In *Shamaldas Kshettry v. Phanindranath*, 73 Ind. Cas. 467: 1923 A. I. R. 532 (Cal.) the Court observed: "If a secured creditor can proceed to realise his security

or deal with it in the same manner as he would have been entitled to do had Sec. 28 not been passed, we do not see how the reputed ownership clause in sub-section 3 can have any operation." It has also been held in *Moti Ram v. E. H. Rodwell*, 21 A. L. J. 32: 1923 A. I. R. 159 (Allahabad) that Sub-section 6 is as clear as it can possibly be and provides unambiguously that no property over which a secured creditor has a legal charge shall be affected by any of the provisions of the sub-sections which precede it, i.e., sub-section 3. So also in *Sant Prasad Singh v. Sheo Dut Singh*, I. L. R. 2 Patna, 724, that a secured creditor is entitled to realise his security in any way he chooses unhampered by the provisions of the Provincial Insolvency Act.

The above rulings practically make sub-section 3 nugatory, contrary to the intention of the legislature. If sub-section 3 had no operation at all, there was no reason why it should have been embodied in the Act itself. The anomaly created by the authorities cited above is due to the fact that the distinction between a secured creditor in general and a secured creditor of *goods in trade or business* allowed to be in the order or disposition of the debtor has not been properly kept in view. No doubt a secured creditor is not hampered in any way by the provisions of the Insolvency Act provided his security does not consist of goods in trade or business in the order or disposition of the debtor, as contemplated in Sub-section 3. Sub-section 3 is based upon the doctrine of estoppel and is an exception to the general rule laid down in sub-section 6.

Sub-section (7).—There may for various reasons elapse a long time between the presentation of the application and the order of adjudication passed therein under the Provincial Insolvency Act. Under the Presidency Towns Insolvency Act, III of 1909, Section 10, an order of adjudication is passed on the presentation of an application for insolvency, and in England order of adjudication takes effect from the date of an act of insolvency; under the Provincial Insolvency Act it takes effect from the date of the presentation of the application for the purpose of making the properties of the insolvent liable to claims of the creditors. It follows that from that time the property of the debtor is made available for the payment of the debts. In *Rakhal Chandra Purkait v. Sudhindra Nath Bose*, 46 Cal. 991: 24 C. W. N. 172, it has been held that "if the contentions of the appellant were accepted the provisions of the Act might be defeated in some cases. After the petition for insolvency is made, the order of adjudication may be delayed in some cases for more than 2 years, for instance

Sec. 28.] ADJUDICATION RELATES BACK TO ADMISSION. 147

where the matter goes up to the Privy Council on appeal, and in such a case transfers made by the insolvent within 2 years before the date of the presentation of the petition for insolvency but more than 2 years before the order of adjudication would become valid. We don't think that such a result has been contemplated." The bankruptcy in England is deemed to have relation back to and to commence at the time when the act of bankruptcy is committed. *Re. Bumpus, Ex-parte White*, 1908 W. N. 90. The effect of subsections (2) and (6) of Sec. 16, now (2) and (7) of Sec. 28, is that, while no vesting of the property of the insolvent in the Receiver takes place until the order of adjudication is made, and it is the order of adjudication which vests the property, nevertheless by a legal fiction the vesting of the property of the insolvent in the Receiver must be deemed to have taken place, when once an order of adjudication has been made, at the date of the presentation of the petition, or in other words, the commencement of the insolvency, *Sheonath Singh v. Munsu Ram*, 42 All 433: 55 Ind. Cas. 941: 18 A. L. J. 449. See also *Bhagwant v. Munim Khan*, 8 Ind. Cas. 1115: 6 N. L. R. 146, *Sankar Narayana v. Alagiri*, 49 Ind. Cas. 283: 1918 M. W. N. 487: 24 M. L. T. 149: 35 M. L. J., 296.

Contrary views.—Following *Jokhan Sing v. Deputy Commissioner of Fyzabad*, 23 Ind. Cas. 924 the Lahore High Court has recently held in *Ghulam Muhammad v. Panna Ram*, 72 Ind. Cas. 433, that Sec. 16 (6), now 28 (7), does not govern Section 36, now Section 53, of the Act, and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under the section. "The meaning of a statute is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did in fact employ."

English Law.—The assets of a bankrupt, under the English Bankruptcy Acts, vest in the trustee in bankruptcy from the date of the acts of bankruptcy. On Sept. 20, 1917 a debtor transferred his assets including certain furniture to a company. On Sept. 27 he committed an act of bankruptcy and a receiving order was made against him on Oct. 24 1917 on a petition presented on Oct. 8, followed by an adjudication order on Dec. 12. After the date of the receiving order part of the furniture was sold by the company to a *bona-fide* purchaser for value without notice. On Feb. 3, 1919 the transfer of

Sept. 20 was held to be fraudulent and void and an act of bankruptcy and the company was ordered to deliver to the trustee all the property comprised in that sale or the value thereof. No payment having been made the trustee claimed to recover the furniture or the value from the purchaser. Held (1) on the authority of *Brinsmead v. Harrison*, 1871 L. R. 6 Ch. Prac. 584, that the judgment against the

ceeding against the purchaser to recover the furniture; and (2) by Lord Stearnsdale, M. R. and Warrington L. J. that the title of the trustee relates back to the act of bankruptcy of Sept. 20, 1917 and that neither the purchaser nor any subsequent transferee could establish any title as against the trustee, *In Re. Gunsboury*, 1920, L. R. 2 K. B. 426.

29. [New] *Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose.*

NOTES.

Review.—This section is new. It has been provided in Sec. 28 (2) that on an order of adjudication no creditor to whom the debtor is indebted shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding without the leave of Court. This does not provide for the suits that are already pending in different Courts against the insolvent. In regard to such suits it is provided by this section that on proof that an order of adjudication has been made, these suits if for realisation of money, will be stayed, and if not for realisation of money, may be allowed to continue on such terms as the Court will impose.

Sec. 28 does not contemplate the grant of permission by the Insolvency Court to continue a civil suit filed against an insolvent without such permission. Sec. 29 of the Act however contemplates not only a suit filed *before* an order of adjudication has been made but also one filed *after* the order but in real ignorance of it. Therefore, when a suit is filed against an insolvent in the Civil Court in ignorance of the adjudication order and consequently without obtaining the

permission of the Insolvency Court to continue the suit, under Sec. 28 of the Act, the Civil Court can under Sec. 29 either stay the suit or allow it to continue on such terms as it might impose, *e. g.* that he would not execute the decree against the property of the insolvent whilst the adjudication order stood, though a condition like this is imposed automatically. *Haji Umar v. Jwala Prasad*, 79 Ind. Cas. 662: 1924 A. I. R. (Nag.) 300.

"There is no provision in the Act for the dismissal or stay of suits which are pending against a debtor when an order of adjudication is made against him. We have therefore proposed the addition of a new section on the lines of section 18 (3) of the Presidency Towns Insolvency Act, 1909." *Select Committee Report, 24th September, 1919.*

Suits Before and After Adjudication.—"The Provincial Insolvency Act does not authorise an Insolvency Court to stay every litigation," *Ram Sunder Rai v. Ram Dhyani Ram*, 3 P. L. J. 456: 1918 Pat. 303: 5 P. L. W. 250: 46 Ind. Cas. 224. "By Sec. 16 (2) now Sec. 28 (2) an order of adjudication operates not as an absolute stay of all proceedings against the insolvent but as a direction that before a suit is brought a condition precedent should be complied with *viz.* leave of the Court should be obtained," *Ramaswami Pillay v. Gobindaswami Naicker* 25 M. L. T. 247. "The rule that a suit should not be instituted against a Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed only applies to cases in which the Receiver is appointed in an action and does not apply to a Receiver as mentioned in the Provincial Insolvency Act who is really what is known in the old English Law as an assignee in bankruptcy," *Amrita Lal v. Narayan Chandra*, 30 C. L. J. 515.

Under Sec. 10 (2) of the Bankruptcy Act, 1883, the Court has power to stay any action, execution, or other legal process against the property or person of the debtor. This power may be exercised at any time after the presentation of a bankruptcy petition, before a receiving order as well as after. If upon the hearing of the petition for committal the debtor satisfies that receiving order had been made against him or that he has been adjudicated insolvent and that the debt was provable in bankruptcy no order for committal can be made and if made and he makes an affidavit that any of these had happened, it can not be enforced and if he has been arrested, he shall be released, *Re. Nuthally* 1891 W. N. 55.

Proceedings which cannot be stayed.—Proceedings of a preventive character will not be restrained. Imprisonment for non-payment of rates is a punitive process and an Insolvency Court has no power to discharge a person so imprisoned, *Re Edgcombe, Ex parte Edgcombe* 1902, 2 K. B. 403. Actions or proceedings in respect of a debt or liability which is not provable in bankruptcy are unaffected by the making of a receiving order. Thus obligation to make payment of alimony may be made and enforced in spite of the receiving order, *Linton v. Linton*, 1885, 15 Q. B. D. 239. The fact that a husband who is in arrears of maintenance has been adjudicated an insolvent under Sec. 27 of the Provincial Insolvency Act is conclusive as long as the order of adjudication stands, that he is unable to pay the amount due. And he is not, therefore, guilty of wilful neglect within Sec. 488 (3) of the Criminal Pro. Code. *Halfhide v. Halfhide*, 50 Cal. 867.

See also Notes under Sec. 3 *supra*.

30. [16 (7)] Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, *the period within which the debtor shall apply for his discharge*, and the Court by which the adjudication is made, shall be published in the local official Gazette and in such other manner as may be prescribed.

NOTES.

Review.—This is section 16 (7) of Act III of 1907.

Want of notice is a mere irregularity and proceedings cannot be set aside without proof of prejudice, *Ramkomol Saha v. Bank of Akyab*, 5 C. W. N. 91.

Proceedings consequent on order of adjudication.

31. [New] (1) *Any insolvent in respect of whom an order of adjudication has been made may apply to the Court for protection, and the Court may on such application make an order for the protection of the insolvent from arrest or detention.*

(2) *A protection order may apply either to all the debts of the debtor, or to any of them as the Court may think proper, and may commence and take effect at and for such time as the Court may*

direct, and may be received or renewed as the Court may think fit.

(3) A protection order shall, protect the insolvent from being arrested or detained in prison for any debt to which such order applies, and any insolvent arrested or detained contrary to the terms of such an order shall be entitled to his release :

Provided that no such order shall operate to prejudice the rights of any creditor in the event of such order being revoked or the adjudication annulled.

(4) Any creditor shall be entitled to appear and oppose the grant of a protection order.

NOTES.

Review.—This section is new.

The reasons for the introduction of this new section are to be found in the following extract from Sir George Lowden's Speech:—
 "The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. I will pursue for a moment the course of the dishonest debtor; he files his petition and if in jail he automatically gets his release under the existing Act, and he is practically protected from going to jail again. That is sufficient for him; that is all he wants; he does not want to pay his debts; all he wishes is to escape the penalty of jail. In the second place, we propose to abolish the automatic protection which he gets upon adjudication. It is proposed by this Bill to repeal the provision of the existing Act which provides that immediately on adjudication the insolvent should be released from jail and make it necessary for him to apply to the Court for protection leaving it to the discretion of the Court to grant him protection in any degree it thinks fit."

Difference.—The difference between Act III of 1907 and this Act in relation to protection granted to the insolvent is, that under Act III of 1907, the debtor if in prison had on the making of an order of adjudication to be released automatically and thereafter no creditor to whom the insolvent was indebted could during the pendency of the insolvency proceedings proceed against the person or property of the insolvent. Under the present Act, on the making of an order of adjudication, if the debtor is in prison his release will not follow as a matter of course. But he will have to apply to the Court for protection and the Court may on such application make an order for

protection of the insolvent from arrest or detention or may dismiss the application. It is also in the discretion of the Court to grant the order of protection in respect of all the debts or in respect of any particular debt and to be in force for such time as the Court may direct. If on any objection by a creditor it appears that the insolvent is guilty of fraud, misrepresentation &c., the Court will take those objections into consideration in passing that order.

Scope.—This section empowers the Court to grant relief to a debtor after adjudication if upon the facts and circumstances it appears to be a fit case for granting the protection. Under this section each application must be decided on its own merits.

Sec. 31 deals with applications for protection only *after* the order of adjudication is made. The only other provision in the Act which deals expressly with what may be called protection *before* adjudication is Sec. 23. The condition under which the Provincial Insolvency Act allows the Court to interpose between an insolvent and his judgment-creditors before adjudication is where a decreeholder has arrested him. *Sinnaswami v. Aligi Goundan*, 47 M. L. J. 530: 1924 M. W. N. 836: 80 Ind. Cas. 938: 1924 A. I. R. (Mad.) 893. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under Sec. 34. *Hiralal v. Tulsi-ram*, 80 Ind. Cas. 946.

"May"—A protection order is a privilege to be granted or withheld as the Court in its discretion may determine. In exercising that discretion it is relevant and proper for the Court to have regard to the character and circumstances of the insolvency. Where the insolvency is of a flagrantly culpable kind being the result of gross extravagance accompanied by grave malpractices and a total disregard of the creditors whose money was squandered protection should not be granted." *Hazi Essack v. Shaikh Abdul Rahaman*, 17 Bom. L. R. 989: 40 Bom. 461: 31 Ind. Cas. 507, also in 18 Bom. L. R. 198: 33 Ind. Cas. 694: 41 Bom. 312. See also *Malchand v. Gopal Chandra Ghosal*, 21 C. W. N. 298.

32. [New] *At any time after an order of adjudication has been made, the Court may, if it has reason to believe on the application of any creditor or the receiver, that the debtor has abscond-*

Power to arrest after adjudication.

ed or departed from the local limits of its jurisdiction with intent to avoid any obligation which has been, or might be imposed on him by or under this Act, order a warrant to issue for his arrest, and on his appearing or being brought before it, may, if satisfied that he was absconding or had departed with such intent order his release on such terms as to security as may be reasonable or necessary, or if such security is not furnished, direct that he shall be detained in the civil prison for a period which may extend to three months.

NOTES.

Review.—This section is new and should be read with sec. 69 *infra*.

The introduction of this new section also is explained in Sir George Lowndes' Speech quoted under Section 31 *supra*. 'We have also provided a new section to arrest a debtor who has absconded after an order of adjudication has been made against him.'—*Select Committee Report*, 24-9-19.

This section authorises the Insolvency Court to deal with a fraudulent debtor and commit him to prison if the intention of the debtor to defeat or delay his creditors is made out.

The only penal section in Act III of 1907 was section 43 which laid down duties of the debtor who had been adjudicated insolvent and who could be committed to prison if he is guilty of (1) wilfully making false entries in the inventories or lists, (2) fraudulently or vexatiously concealing, destroying, transferring and refusing to produce any books of account, (3) committing any act of bad faith in performance of any duties imposed on him by Act III of 1907.

According to section (2) of the Bankruptcy Act, 1883, it is a felony for any bankrupt after presentation of a petition by or against him or within 4 months before such presentation to leave or attempt to leave England and take with him any of his property to the value of £20 which by law ought to be divided amongst his creditors unless the jury is satisfied that he had no intention to defraud.

For Notes & Cases *vide* under section 69 *infra*.

33. [24] (1) *When an order of adjudication has been made under this Act, all persons alleging themselves*
Schedule of creditors.

to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of debts, respectively, and shall frame a schedule of such persons and debts :

Provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule.

(2) A copy of every such schedule shall be posted in the Court-house.

(3) Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act, and not entered in the schedule, and the Court, after causing notice to be served on the insolvent and the other creditors *who have proved their debts*, and hearing their objections (if any), shall comply with or reject the application.

34 [28 (2)] (1) *Debts which have been excluded on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act.*

[28 (1)] (2) Save as provided by sub-section (1), all debts and liabilities, present or future certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such ad-

judication, shall *be deemed to be debts provable under this Act.

Notes to Sections 33 & 34.

Review.—These sections are mainly section 24 & 28 of Act III of 1907. The addition of the words “ who have proved their debts ” after “ creditor ” in sub-section (3) has been made “ to obviate the necessity of sending notices to creditors who have not yet proved their debts and thus to shorten the proceedings.”—*Notes on Clauses.*

Section 33 provides the summary method of proving debts by persons alleging themselves as creditors of the insolvent. The proof consists in filing an affidavit only, setting forth the circumstances of the debt and the amount still due thereon and producing documents in proof of the debts as exhibits. The summary method has been provided to avoid costs and delay in obtaining decrees of Civil Courts and the Insolvency Court has been given the power to decide the validity or otherwise of a claim so proved, and such decision of the Insolvency Court regarding the claim of the creditor shall be final unless appealed against. No suit lies in a Civil Court against that order for a declaration that the order passed by the Insolvency Court is wrong and illegal. The Receiver in framing a schedule of creditors does not decide judicially or finally upon contested claims and his framing a schedule under Sec. 23 now 33 does not preclude the Court from entertaining an application by the Receiver under Ss. 26 and 36 of Act III of 1907, now Sections 50 and 58, to expunge the names of the creditors from the schedule, *Khadir Shah v. Official Receiver, Tinnevely*, 41 Mad. 30. After being adjudicated insolvents the appellants proposed a scheme of composition which was rejected by the District Judge. They subsequently represented to the Court that a majority of the creditors had accepted half their respective dues in full satisfaction of their claims as suggested in the scheme for composition. These creditors subsequently filed petitions in court stating that they have been induced by false and fraudulent misrepresentations of the insolvents to accept from them half of the principal sums due to them and prayed that on payment by them into Court of the said sums they should be permitted to prove their claims. Held that in view of the provisions of Sec. 28, now Sec. 34, and Sec. 38, now Sec. 55, these transactions could not be recognised in insolvency proceedings and the petitioning creditors were entitled to prove their

claims as they stood on the date of adjudication, *Beharilal Sikdar v. Harsookdas Chakmull*, 25 C. W. N. 137.

Meaning of Provable Debts and Proof.—When a person has become bankrupt the rights which before the bankruptcy his creditors enjoyed of enforcing their claims against him and his property cease to be enforceable and in their place the creditors acquire a right to share equally and proportionately in the distribution by the trustee in bankruptcy of the assets which have been vested in him. *Re. Higginson and Deal* 1899 1 Q. B. 325. The debts and claims in respect of which the creditors become thus entitled are called *provable debts* and the method by which their claims are asserted and established is called *proof*. The protection which the Insolvency Act extends to a debtor against his arrest or attachment or sale of his property can only be enjoyed by him in respect of debts provable under the Act and not otherwise. *Hira Lal v. Tulsi Ram*, 80 Ind. Cas. 946; 1925 A. I. R. (Nag.) 77.

Debts provable under the Act.—With certain exceptions the debts provable in bankruptcy include all debts and liabilities, present and future, certain and contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of obligations incurred before the date of the receiving order, *Ex parte Stone*, 1873 8 Ch. App. 914. The term 'liability' includes any compensation for work done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied contract, agreement or undertaking, whether the breach does or does not occur or whether it is or is likely to occur or capable of occurring before the discharge of the debtor. Generally it includes any express or implied engagement, agreement or undertaking resulting in or capable of resulting in an obligation to pay money or money's worth, whether the payment is, as respects amounts, fixed or unliquidated, as respects time, present or future, certain or contingent, as to valuation, capable of being ascertained by fixed rules or is a matter of opinion. *Vide Sec. 37 Bankruptcy Act 1883*. To be a 'provable debt' according to the definition of Sec. 34 it must be a debt to which he has become subject by reason of an obligation incurred before the date of his adjudication as an insolvent. The words "obligation incurred" refer to an obligation incurred by the insolvent himself. *Keshoram v. Govind Ram*, 1923 A. I. R. 142 (Nag.). The

rule contained in Sec. 34 as regards debts provable under the Act is consistent with the rule deducible from English cases. All debts to which the debtor is subject when he is adjudged an insolvent are debts provable under the Act. Under the Section therefore, it must be debt to which the debtor was subject on the date of adjudication. If the debt was then subsisting it is provable in insolvency. *Sivasubramania Pillai v. Theethiappa Pillai*, 45 M. L. J. 166: 1923 M. W. N. 895. Thus arrears of maintenance due are debts provable, *Tokeer Bibi v. Abdul Khan*, 5 Cal. 536; *Halfhide v. Halfhide*, 50 Cal. 867. Annuities for life are debts provable. *Ex parte Jackson*, 20 W. R. 1023. Unliquidated damages arising out of breach of contract are debts provable, *In Re. Omerto Lal Daw*, 13 B. L. R. App. 2. So forward contracts being demands in the nature of unliquidated damages are claims provable under the Act and they are also provable as contingent debts, *In Re. Moosaji Lotia*, 15 Ind. Cas. 825: 5 S. L. R. 249, *In the application of Dholan Dass to declare the firm of Walbdas Holaram insolvents*, 56 Ind. Cas. 158. So also contingent liability of a surety who has not been called upon to pay or has not in fact paid is a provable debt, *In Re. Paine* 1897 1 Q. B. 122: *In Re. Blackpool Motor Co., Ltd.* 1901 1 Ch. 77. Money held in deposit with a bank is debt provable, *Kartar Devi v. Surasati*, 9 P. R. 1908, *Official Assignee Madras v. G. Smith*, 32, Mad. 68 *Official Assignee, Madras v. D. Rajam Aiyar*, 33 Mad. 299. But money held in suspense is trust and not a debt provable, *Official Assignee, Madras v. D. Rajan Aiyar*, 36 Mad. 499. So property held by a bankrupt in trust for others is not his property, *In Re. Charri*, 2 Mad. 13.

Date of Adjudication.—The “date of adjudication” in Sec. 28 of the Provincial Insolvency Act means the date on which the adjudication is actually made and not the date of the presentation of the petition on which the adjudication is made. A creditor is therefore not debarred from proving a debt incurred by the insolvent subsequent to the date of the presentation of the petition but prior to the date of adjudication. *Chetti v. Ba Tin*, 13 Bur. L. T. 117: 61 Ind. Cas. 640. Under Sec. 34 (2) the date of adjudication is the point with reference to which it should be determined whether the recovery of a debt is barred by time or not. When a debt is held to be provable within the meaning of the foregoing section it is still open to the Court to reject the application for entering the name of the creditor in the schedule on grounds other than that of

the debt being barred by limitation. *Ijaz Husain v. Lachman Das*, 75 Ind. Cas. 790: 1924 A. I. R. (Oudh) 351.

Joint-Debts.—Where a member of Joint Hindu family has been declared insolvent the Insolvency Court alone has jurisdiction in the matter of a debt due by him jointly with other members of the family. Such a debt must be proved under Sec. 28, now 34. It cannot be split up so as to render a suit competent for the recovery of a moiety of the debt from the non-insolvent members of the family in ordinary course. *Vithal v. Ramchandra*, 72 Ind. Cas. 327.

Private Arrangement.—After being adjudicated insolvents the appellants proposed a scheme for composition which was rejected by the District Judge. They subsequently represented to the Court that a majority of the creditors had accepted half their respective dues in full satisfaction of their claims as suggested in the scheme for composition. These creditors subsequently filed petitions in Court stating that they had been induced by false and fraudulent misrepresentations of the insolvents to accept from them half of the principal sums due to them and prayed that on payment by them into Court of the said sums they should be permitted to prove their claims. Held “that in view of the provisions of Sections 28 and 38, now 34 and 55, these transactions could not be recognised in insolvency proceedings and the petitioning creditors were entitled to prove their claims as they stood on the date of adjudication,” *Beharilal Sikdar v. Harsukhdas Chakmali*, 25 C. W. N. 137. A private arrangement, by the laws of England i.e. the Deeds of Arrangement Act, 1914, by which the creditor consents to be paid by the debtor in a certain manner, without being entitled to bring any action against the debtor in respect of the scheduled debts, is *void*, unless registered, and its terms are not binding upon the creditor. Pollock, M.R., in delivering the judgment of the Court of Appeal, observed “it is said to be estoppel and for that purpose one must find that there has been some representation made by some person to another with the intention and with the result of inducing the person to whom the representation was made to act on the faith of that representation and to alter his position to his detriment. Are these features present in this case? The appellant agreed to an assent to a void deed, but the assent becomes equally with the deed a nullity. *In Re. A Bankruptcy notice* (1924) 2 Ch. D. 76..

Barred Debts.—In *Sivasubramania Pillai v. Theethiappa Pillai*, 45 M. I. J. 166: 1923 M. W. N. 895, the argument advanced was that

a barred debt could not be proved in insolvency. Venkatasuba Rao J. held that "I shall say nothing in regard to the question as to whether the pendency of insolvency proceedings does or does not save a debt from the bar of limitation. In the present case the debt is sought to be proved in the insolvency itself and no claim is based upon the debt in a separate proceeding. *Ex parte Ross*, 2 Gl. & Jameson's Bankruptcy Cases, 46, and 330, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Banking Corporation, In re. Westhy*, 10 Ch. D. 776. A very clear statement of the principle is contained in the following passage in the judgment of Bacon, C. J. in that case "when a bankruptcy ensues, there is an end to the operation of that statute with reference to debtor and creditor. The debtor's rights are established in the bankruptcy, and the Statute of Limitation has no application at all to such a case, or to the principles by which it is governed." The authority of these decisions has not, in the slightest degree, been shaken by *Benson, In re. Bower v. Chetwyned*, (1914) 2 Ch. 68. On the contrary the judgment in it while holding that the pendency of the bankruptcy proceedings did not save a claim made in the Courts of an administration suit from being barred by the statute of limitation carefully distinguished *Ex parte Ross* and other cases similar to it, as being cases where the proof was in the bankruptcy itself. *There can be no doubt that in bankruptcy a debt does not become barred by lapse of time if it was not barred at the commencement of the bankruptcy but this is so, only in the bankruptcy.*"

Any debt under the Provincial Insolvency Act whose recovery was not barred by limitation on the date of adjudication of the debtor as an insolvent can be proved in insolvency at any time even after a conditional order of discharge and until a final order of discharge is ordered. The facts that the debt is merged in a decree and more than 12 years had elapsed before the application to prove the same was made, are immaterial, if the decree-debt was capable of execution on the date of adjudication. *Sivasubramania v. Theethiappa Pillai*, 47 Mad. 120: 45 M. L. J. 166: 1924 A. I. R. (Mad.) 163: 75 Ind. Cas. 572.

Debts not provable.—There are 3 classes of debts and liabilities which are not provable in bankruptcy viz., (1) demands in the nature of unliquidated damages which arise otherwise than by reason of contract, promise or breach of trust, (2) debts and liabilities contracted by the debtor with a creditor who has notice of an available act of bank-

ruptcy, (3) contingent debts and liabilities which in the opinion of the Court are incapable of being fairly estimated, *e.g.* alimony to be paid periodically, but which may not last and may be varied, *Linton v. Linton*, 15 Q. B. D. 239. A debt or liability incurred by an insolvent after the order of adjudication is not provable under the Insolvency Act. The jurisdiction of the Civil Court to entertain a suit in respect of such a debt or liability is not barred by the provisions of the Insolvency Act so as to oust the jurisdiction which vests in the Civil Court to try all suits of a civil nature under Sec. 9 of the C. P. Code. *Hira Lal v. Tulsi Ram*, 80 Ind. Cas. 946: 1925 A. I. R. (Nag.) 77. The untaxed costs are not debts provable in bankruptcy because it was not a debt or liability, certain or contingent, to which the debtor was subject at the date of the receiving order or to which he might become subject before his discharge by reason of any obligation incurred before that date. *In Re. Pitchford* (1924) 2 Ch. D. 260. *For other debts not provable vide Sec. 44 and notes thereunder.*

Other debts not provable.—Besides the above there are some other liabilities which though arising out of contract are not provable, and are so unaffected by an order of discharge, *e.g.*, a promise to marry a covenant not to molest or to carry on a particular trade, also debts founded on an illegal consideration, *e.g.*, stifling of a prosecution, *Ex parte Thomson*, 1 Atkins 125. So also debts due for compromising or compounding criminal offences, *Ex parte Elliott*, 1873 2 Dea 179. A gaming debt is not provable, nor debts barred by limitation, *Ex parte Dewdney* 188 15 Ves. 479, followed in *Baranashi Koer v. Bhabadeb Chatterjee*, 34 C. L. J. 169.

The amount of deferred dower is not provable. Held in *Mirza Ali v. Quadiri Khanam*, 21 P. L. R. 1919: 50 Ind. Cas. 774, "it was not fair to suspend the discharge of the insolvent on account of an undetermined liability which might never arise and that the Court was not competent to make it a condition of the discharge of the insolvent that the insolvent should furnish security for the amount of the liability." Obligations incurred after the date of adjudication are not debts provable under the Act, *Ganga Pershad v. Feda Ali*, 48 Ind. Cas. 913.

Framing of the Schedule.—"The framing of the schedule is the duty of the Court and not of the Receiver. Though a report from the Receiver may in some cases assist the Court it is for the Court to decide on each claim on evidence and in the case of contest after hearing necessary parties," *Beharilal Sikdar v. Harsukdas Chakmali*, 25 C. W. N. 137..

Schedule of creditors.—No one can be regarded as creditor for the purpose of distribution until his name is admitted to the schedule or until he establishes it there, *In the matter of Chunilal Oswal*, 29 Cal. 503. The Insolvency Court has the same power as the ordinary Civil Court to correct mistakes on questions of fact but it has no jurisdiction to entertain an application under this section when the creditor has exhausted all his remedies, *Ram Chander Sarup v. Mahajan Hussain*, 1 U. P. L. R. 69: 51 Ind. Cas. 55.

Creditors whose names are already in the schedule prepared under Sec. 24, now Sec. 34, are entitled to be heard before the debt of a creditor who comes in at the last minute under Section 24 (3) now 33 (3), is entered in the schedule, *Allahabad Bank v. Murlidhar*, 34 All. 442: 9 A. L. J. 577. It is open to any creditor to challenge the validity of a debt set up by another creditor and if he does so the Judge is bound to enquire into the truth of his allegations in the insolvency proceedings and cannot merely refer the application to his remedy by suit, *Khusali Ram v. Bholarmal*, 37 All. 252.

Discharge of the insolvent is not discharge of the debts of the creditor who fails to have his name entered. There is no limitation fixed for unscheduled creditors to come in and prove their claims and such creditors can proceed against the property paid out to the insolvent by the Receiver after payment to the scheduled creditors, *Lakshmanan v. Muttia*, 11 Mad. 1: *Harapriya v. Shama Charan*, 16 Cal. 592: *Ashraf-uddin v. Bepin Behari*, 30 Cal. 407: *Sheoraj v. Gauri*, 21 All. 227: 19 A. W. N. 45, *Amathlal v. Cursetji*, 9 Bom. L. R. 466. The scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to or independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree unmaintainable, *Abdul Rahman v. Behari Puri*, 10 All. 194.

Schedule and its effect.—Under the provisions of Sec. 352 of the Civil Procedure Code, 1882, the framing of a schedule was deemed to be a decree in favour of each of the creditors for their respective debts. "If a schedule had been framed as directed by Sec. 352 and the appellant's name entered therein as a creditor together with the debt due to him the declaration of insolvency made under Sec. 351 would operate as a decree regarding the debt," *Arunchala v. Ayyavu*, 7 Mad. 318. "The apparent intention suggested by Sec. 352 is that there must be a schedule, and that the declaration of insolvency and the insertion of a

specific debt, its amount, and of the creditor's name in the schedule are together to have the operation of a decree as regards that debt," *Ibid.* The said Section 352 C. P. C. and other Sections of Ch. XX of the C. P. C. 1882 have been repealed by Act III of 1907 and Sec. 352 re-enacted in Sec. 24 of Act III of 1907 and in Sec. 33 of Act V of 1920 without the clause "and the declaration under Sec. 351 shall be deemed to be a decree in favour of such creditors in respect of their said respective debts." And under Sec. 78 *infra* it has been provided that a decision under Section 4 shall only be deemed a decree, *Arunachala v. Ayyavu*, 7 Mad. 318 followed in *Harya v. Mulchand*, 64 P. R. 1907: 89 P. W. R. 1908 and *Amthalal v. Cursetji*, 9 Bom. L. R. 466.

A creditor is originally entitled to put his bond in suit and to obtain a decree, for his right of suit was a necessary incident of the obligation created in his favour by the bond in question. This right having accrued once, it must be taken to subsist unless it is either satisfied or exhausted by use or barred by limitation or becomes extinct by operation of law. The section imposes a duty upon the creditors and upon the Court, and the proper construction to be placed upon it is that the creditors must prove their debts. Although a duty is imposed upon the Court still under the processual law it is the party likely to benefit by its performance to see that it is performed. Under the C. P. C. an unscheduled creditor could execute his decree against the insolvent after the insolvent was discharged, *Harapriya Dehya v. Shama Charan Sen*, 16 Cal. 592. Or he may at any time before the discharge of the insolvent tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule, Sec. 33 (3).

A creditor who does not have his debt scheduled is not precluded from enforcing his claim against the insolvent after his discharge. A composition deed is binding only on the scheduled creditors. *Firm of Meghraj Nevendram v. Firm of Virbhandas*, 76 Ind. Cas. 250: 1924 A. I. R. (Sind) 122.

S. 33 (3).—Time for Proof. "May."—In *Sivasubramania Pillai v. Theethiappa Pillai*, 45 M. L. J. 166: 1923 M. W. N. 895, it was contended that under Sec. 24 (3) of the Act III of 1907, now Sec. 33 (3), a creditor would be bound to tender proof of his debt *before the discharge of the insolvent*. The Court held "I am unable to interpret this provision as rendering it obligatory upon a creditor to tender proof before the discharge of the insolvent. Under Sec. 44, now 41, a debtor may at any time after the order of adjudication apply for an order of

discharge. There is nothing in the Act to prevent an order of discharge being passed at a very early date after the order of adjudication, and it seems to be inconsistent with the scheme of the Act to hold that a creditor who does not prove his debt before an order of discharge is deprived altogether of his remedy." The law of insolvency allows proofs of debts at any time during the administration so long as there are assets to be distributed. The discharge contemplated by Sec. 33 (3) is the final discharge and not a conditional discharge of the insolvent. The effect of a conditional discharge is not to terminate the insolvency proceedings. A conditional discharge does not debar a creditor from proving his debt in insolvency. A creditor is entitled to render proof of his debt at any time during the administration so long as there were assets to be distributed and no injustice is done to third parties. *Babu Lal Sahu v. Krishna Prasad*, 1 L. R. 4 Pat. 128: 85 Ind. Cas. 543.

Appeal.—An appeal lies against orders regarding entries in the schedule under Sec. 75 (2), Schedule 1 *infra*.

Annulment of adjudication.

35 [42(1)] Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication.

Power to annul adjudication of insolvency.

NOTES.

Review.—This is section 42 (1) of Act III of 1907, and 21 (1) of Presidency Town Insolvency Act, 1909.

An adjudication order may be annulled (1) when it ought never to have been made, (2) when the Court is satisfied that the debts have been paid in full, or (3) when a composition or scheme has been accepted or approved. In *Ramchandra Neogi v. Shama Charan Bose*, 18 C. W. N. 1052: 19 C. L. J. 83, it has been held that "there is no room for controversy that the order of annulment could not have been made under Sec. 42 (1). In the case before us the debts of the insolvent have not been paid in full nor has there been any composition or scheme approved by the Court, consequently the order can be supported only if it is established that the debtor should not have been adjudged insolvent."

Abuse of the Process of the Court.—An order made under proceedings which are an abuse of the process of the Court or foreign to the purpose of the Bankruptcy Act should be annulled, *Ex parte Painter, Re. Painter*, 1895, 1 Q. B. 851. Or an order made under a defective petition which has not been amended before the making of the receiving order or adjudication order, *Ex parte Coombes*, 1877, 5 Ch. App. 979, or upon evidence stating that the debtor has absconded which turned out to be untrue, *Re. Bright* 1903, 1 K. B. 735, or where the debtor was dead at the time when the bankruptcy proceedings were taken against him, *Ex parte Geisel*, 1882, 22 Ch. D. 436, or where a minor has been declared insolvent, *Sannyasi v. Asutosh*, 42 Cal. 225, *Jagmohan Narain v. Girish Babu*, 42 All. 515: 58 Ind. Cas. 557, or where the Court had no jurisdiction or where there were no assets to be distributed, or where the object was to extort money.

When adjudication is an abuse.—The Court has power to refuse or annul an adjudication order when the presentation of the application for insolvency amounts to an abuse of the process of the Court. The appellant's debtors were adjudicated insolvents in 1906; subsequently they obtained their personal discharge and the insolvency proceedings were abandoned. On the 12th December 1912, the appellants again filed their insolvency petition and an order of adjudication was made thereon. On the 2nd February 1915 that order of adjudication was annulled as the insolvents did not apply for their discharge within time. On the 5th March 1915 the appellants again presented their petition for insolvency *there being no change in their circumstances*, the debts and their creditors remaining the same. Held, that "the presentation of the insolvency petition by the debtors on the 5th March 1915 under such circumstances was an abuse of the process of the Court and the adjudication order upon it must be annulled," *Malchand v. Gopal Chandra Ghosal*, 21 C. W. N. 298. In *Re. Ballarchand Serowie*, 27 C. W. N. 739, it was held following *Malchand v. Gopal Chandra*, that the presentation of a second insolvency petition by the debtors was an abuse of the process of the Court and a second adjudication order founded upon it must be annulled.

Does this Principle apply to proceedings under the Provincial Insolvency Act?—The cases of *Malchand v. Gopal Chandra* and *In Re. Ballarchand Serowie* are cases under the Presidency Towns Insolvency Act, 1909. Mukherji, J., in delivering a separate judgment in *Malchand v. Gopal Chandra* observed "under the law of England it is well settled that when the presentation of a petition is an abuse of the process of

the Court, the Court may decline to make any order on it or may rescind the receiving order made on the petition. This principle was recognised in the cases of *In Re. Betts* (1901) 2 K. B. 39, *In Re. Painter* (1895) 1 Q. B. 91, *In Re. Hancock* (1904) 1 Q. B. 585 and *Re. Archer*, 20 T. L. R. 390, and has been applied by all the Indian High Courts. It was indicated as applicable to the Provincial Insolvency Act in the case of *Samiruddin v. Kadumoyee*, 15 C. W. N. 244: 12 C. L. J. 445, and has been recently accepted by two full benches, one of the Madras High Court, and the other of the Allahabad High Court, in the cases of *Ponnuasami Chetti v. Narasimha Chetti*, 25 M. L. J. 545 and *Triloki Nath v. Budri Das*, 36 All. 250. See also *In Re. Subhapatty*, 21 Bom. 297. We must take it then well settled that notwithstanding proof of the existence of the conditions mentioned in the statute, the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court, and it is the duty of the Court to have regard to this aspect of the matter when the question is raised."

Distinction between Abuse before adjudication and Abuse after adjudication.—The Privy Council in the case of *Chatrapat Sing v. Kharag Sing Lachmiram*, 21 C. W. N. 497, has held "the dismissal of Chatrapat's petition does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend upon the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of that Act is not to be deprived of that right on so treacherous a ground of decision as an abuse of the process of the Court." In *Re. Ballav Chand Serougie*, 27 C. W. N. 739, Greaves J. in annulling the order of adjudication held that a second adjudication took place some five or six weeks after on the same facts and on the same materials upon which the order of adjudication had been made. Under these circumstances his Lordship annulled the order of adjudication for the reasons stated in the case of *Malchand v. Gopal Chandra*. It was suggested that this is not good law having regard to the subsequent decision of the Judicial Committee in *Chatrapat Sing v. Lachmiram* and his Lordship held that "so far as I can see, that case was decided

by the Judicial Committee on the ground that an order of adjudication was refused because of the misconduct of the debtor which they point out should be dealt with at the time he applies for his discharge; but it seems to me, the facts of the present case and the case of *Malchand v. Gopal Chandra* stand on quite a different ground, and in accordance with that decision I set aside the adjudication."

When annulment should be made.—Where none of the circumstances mentioned in sec. 42 now 35, had been established the order of the Court annulling adjudication on the petition of the insolvent was erroneous and the fact that the Receiver had been unable to satisfy the debts or that the opposing creditor had at one time consented to a composition or that all the creditors consented are not by themselves sufficient to justify the annulment. The Court had to consider not merely that what they have agreed to is for the benefit of the creditors but that the annulment would not be detrimental to commercial morality," *Moti Lal v. Ganpat Ram*, 21 C. W. N. 936: 23 C. L. J. 220.

"There are three conditions which must be fulfilled before an adjudication can be annulled. First, that the Court must come to the conclusion that the debtor ought not to have been adjudged an insolvent. Secondly, when it is proved to the satisfaction of the court that the debts have been paid in full. Thirdly, when a composition or scheme has been approved by the Court under sec. 27, now 38 of the Act. The natural meaning of the words in the first condition is that on the facts as existing at the time of adjudication, an adjudication could not have been made but it does not apply to any subsequent misconduct on the part of the insolvent leading to the annulment of adjudication. An adjudication cannot be annulled on the following grounds:—(1) that an insolvent could pay his debts in full out of his assets, (2) that a part of the property is subject to the Alienation of Land Act, XII of 1900, (3) that the debtor has not given produce of his land to the Receiver," *Jam Khan v. Debi Dutt*, 77 P. W. R. 1915: 29 Ind. Cas. 888: 152 P. L. R. 1915.

II. Payment in full means payment in cash to the amount of 20 shillings in the £, and the assent of the creditors to an annulment of the bankruptcy by having given to the bankrupt absolute release of their debts will not in itself be sufficient to entitle the bankrupt to have his bankruptcy annulled, See 35 Bankruptcy Act, 1883, *Re. Gill*, 1888 5 Morr 272. In *Re. Burnett*, 1 Bans 89, where W. a friend of the bankrupt in his behalf took an assignment of the debts of £1600 for

£140 and another friend on the like behalf paid W. the full amount of the debts which were re-assigned to the bankrupt, this was held not to be payment in full by the bankrupt. See also *Re. Kent*, 1905 2 K. B. 606.

"A private arrangement of the insolvent to pay 4 annas in the rupee in full satisfaction of the claims of his creditors, even though made with all their creditors is neither a payment in full nor a composition within the meaning of the Act so as to entitle the insolvent to an annulment of an order of adjudication," *Brij Kishore Lal v. Official Assignee, Madras*, 43 Mad. 71: 37 M. L. J. 244. "Where a person who has been adjudicated insolvent applies for the adjudication to be annulled on the ground that his debts have been paid in full, the fact that such payments were not made through the Official Receiver is no justification for refusing to grant the annulment," *Pelayudham Pillai v. Official Receiver, Tinnevely*, 26 M. L. T. 139: 1919 M. W. N. 622: 52 Ind. Cas. 689. Held also in *Behari Sikdar v. Harsukdas Chakmul*, 25 C. W. N. 137: 62 Ind. Cas. 904, that a payment of annas eight in the rupee in full satisfaction of the claims of the creditors without the intervention of the Court or the Receiver after a scheme for composition has been rejected could not be recognised in insolvency proceedings.

Undue preference to one creditor is not a ground for annulment of an adjudication order, *Malchand v. Gopal Chandra*, 21 C. W. N. 298. A suit instituted by the Receiver of the estate of an insolvent against a debtor of the insolvent during the pendency of the insolvency proceedings is not rendered unmaintainable on the annulment of adjudication, *Mannu Lal v. Nelin Kumar Mukherji*, 16 A. L. J. 938: 48 Ind. Cas. 433.

III. *Vide* Notes under section 38 *infra*.

Appeal lies against an order annulling adjudication under Sec. 72 (2) schedule I *infra*.

36. [17] If, in any case in which an order of adjudication has been made, it shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor, and that the property of the debtor can be conveniently distributed by such other Court, the Court may *annul the adjudication or stay all proceedings thereon*.

Power to cancel one of concurrent orders of adjudication.

NOTES

Review.—This is section 17 of Act III of 1907 and should be read with section 77 *infra*.

Under section 11 a petition for insolvency by or against a debtor may be presented in any Court within whose jurisdiction he resides or trades or works or has been arrested. If petitions are presented by or against him concurrently in more than one Court, this section gives power to any court to annul the adjudication made by it on proof that another Court can more conveniently deal with the matter. The annulment of adjudication order under this section is a matter of discretion of the Court and may be refused. Where after an order of adjudication had been made by the Madras High Court a second application for adjudication was presented to the Bombay High Court, held, that the prior order of the Madras High Court did not deprive the Bombay Insolvency Court to adjudicate the appellant an insolvent at the instance of a Bombay creditor. Also, the Court had a discretion to refuse the adjudication order if having regard to the circumstances of the case, it considered that an adjudication again in Bombay would be a vain and useless proceeding. In *Re. Arnavyl*, 21 Bom. 227 referred to *In Re. William Watson*, 31 Cal. 761: 8 C. W. N. 553. In a suit for dissolution of partnership and for partnership accounts in the Calcutta High Court a Receiver was appointed of the partnership assets. Subsequently a mortgagee brought a suit in the court of the Subordinate Judge at Dhanbad to enforce a mortgage against the partners in respect of some of the partnership assets and made the Receiver a defendant in his suit. The Receiver of the Calcutta High Court was appointed Receiver of the mortgaged property by the Subordinate Judge, who gave certain directions which were not reconcilable with the order of the Calcutta High Court. *Held*, setting aside the order of the Subordinate Judge, that *where concurrent proceedings for similar relief are taken in two different and independent courts no order should be passed which may lead to friction or conflict of jurisdiction*. *Sridhar Chowdhury v. Mugniram*, I. L. R. 3 Pat. 357: 78 Ind. Cas. 620.

The jurisdiction of each bankruptcy court is partly local and partly imperial. As regards its local jurisdiction it is confined to the claims of debtors who by the express terms of the Act are made subject to its jurisdiction either by domicile or by residence. The imperial nature of the jurisdiction consists in this that it empowers the Bankruptcy Courts to discharge debts wherever contracted *i.e.*, the discharge of a debtor

by a Bankruptcy Court in England, will discharge a debt contracted by the debtor in one of the colonies or colonial states or in India, *Burtley v. Hedges* 1861 30 L. J. Q. B. 352. And the provisions as to the vesting of property in the Receiver extend all over the empire so that when a man is made bankrupt by Bankruptcy Court in England properties which he has in the Colonies or Colonial States or India will become distributable by the English Trustee in Bankruptcy who can enforce his title to it, *Callender Sykes & Co. v. Colonial Secretary of Lagos and Davies*, 1891 A. C. 460.

In *Lalji Sahay v. Abdul Gani*, 15 C. W. N. 253: 12 C. L. J. 452, held the Court has jurisdiction to deal with alienations made by the debtor of properties situate outside its local limits and such jurisdiction is not affected by the provisions of Sec. 16 of the Civil Procedure Code." "A vesting order passed by the Bombay High Court vesting the property of the debtor in the Official Assignee, Bombay, and passed subsequently to an order in insolvency court at Amritsar, had the effect of vesting the property in the Punjab in the Official Assignee, *Official Assignee of Bombay v. Registrar, S. C. Court, Amritsar*, 37 Cal. 418 P. C.: 11 C.L. J. 443: 14 C. W. N. 569: 7 A L J 357: 12 Bom. L R 395 followed in *In Re. Jemanadas*, 40 Cal. 78. "The jurisdiction conferred by Act III of 1907 and Act III of 1909 are distinct. Where an insolvency petition pending before the Madras Insolvency Court was transferred to the District of Tanjore, held that the District Court of Tanjore was not competent to try or dispose of the same, as the two jurisdictions are distinct," *Sreenivasa v. Official Assignee of Madras* 25 M. L. J. 299: 1913 M. W. N. 1004: 14 M L. T 184.

37 [42 (2) and (3)] (1) Where an adjudication

Proceedings on annulment.

is annulled, all sales and disposition of property and payments duly made, and all acts theretofore done, by the Court or receiver shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

(2) Notice of every order annulling an adjudication shall be published in the local official

Gazette and in such other manner as may be prescribed.

NOTES.

Review.—This is section 42 (2) & (3) of Act III of 1907 and corresponds to sec. 35 (2) of the Bankruptcy Act, 1883.

Annulment of adjudication order.—An adjudication order is annulled under Sec. 35 where in the opinion of the Court a debtor ought not to have been adjudged insolvent or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, and also under Sec. 39 when the Court, on approval of proposal for Composition, embodies the terms of the composition in an order and frames a schedule in accordance with the provisions of Sec. 33 and passes an order for the annulment of adjudication.

"Shall vest in such person as the Court may appoint."—On the annulment of an adjudication order the property re-vests in the debtor who was adjudged insolvent. In as much as the Insolvency Court has seisin only over the property of the *insolvent*, the debtor ceases to be an insolvent as soon as the order of adjudication is annulled. Hence "an order vesting the property in some person *other than the bankrupt* may be necessary for the purpose of securing or bringing about the fulfilment of any condition on which the annulment is based." *Flower v. The Mayor of Lymeregis*, (1921) 1. K. B. 488.

A judgment-debtor was declared insolvent by the Insolvency Court and a vesting order made. Part of his property was subsequently attached in execution of a decree. Afterwards his petition in insolvency was dismissed and the vesting order discharged. On the same date a creditor's trust-deed was executed of which the plaintiffs were the trustees. They now sued to set aside the proceedings in execution after the date of the trust deed. Held "the dismissal of the insolvency petition was to re-vest the debtor's property in him as from the date of the vesting order, subject to all acts done by the assignee, or under his authority, during the continuance of the vesting order. The suit was therefore not maintainable," *Ramasami v. Murugesu (Tawker's Case)*, 20 Mad. 452 followed in 27 Mad. 7: 13 M. L. J. 372. A suit instituted by the receiver of the estate of an insolvent against a debtor of the insolvent during the pendency of the insolvency proceedings is not rendered unmaintainable on the annulment of adjudication, *Manu Lal v. Nelin Kumar Mukherji*, 41 All. 200: 16 A. L. J 938: 48 Ind. Cas. 443.

Effect of Annulment.—All sales and dispositions of property and payments duly made and all acts therefor done by the Court or Receiver shall not be affected in any way by the order of annulment and they will stand good. The property of the debtor, if any, subject to any condition attached to the order of annulment shall revert to the debtor to the extent of his right or interest therein and on such conditions as the Court may declare. A claim for breach of contract which became due to the insolvent before adjudication and has not been rendered to him vests in the Official Receiver. Under the English Law the word “property” includes claims in the nature of damages which have accrued due prior to the date of insolvency, excepting the claims in the nature of a personal action for any tort done to the person, which according to the maxim *actio personalis moritur cum persona*, would be assigned. It would therefore follow that on annulment of the order of adjudication the claim for damages for breach of contract would revert either to the debtor or to his trustees appointed by the composition deed. *Motha Ram Daulat Ram v. Phalaj Rai Gopat Das*, 1925, A. I. R. (Sind) 159.

Appeal.—An appeal lies against an order declaring the conditions on which the debtor’s property shall revert to him on annulment of adjudication under sec. 75 (2), Schedule I *infra*.

Compositions and schemes of arrangement.

38. [27 (1), (2), (3), (4), (5)] (1) Where a debtor, after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to all creditors in such manner as may be prescribed.

(2) If, on the consideration of the proposal, a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors.

(3) The debtor may at the meeting amend the terms of his proposal if the amendment is, in the

opinion of the Court, calculated to benefit the general body of creditors.

(4) Where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal.

(5) If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than six annas in the rupee on all the unsecured debts provable against the debtor's estate.

[27 (9)] (6) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of an insolvent.

[27 (6)] (7) In any other case the Court may either approve or refuse to approve the proposal.

NOTES.

...*Review.*—This is section 27 (1), (2), (3), (4), (5), (9) & (6) of Act III of 1907.

Difference.—Section 27 (1) provided for a scheme of composition to be submitted both before and after an adjudication. But under the present section a composition scheme can be submitted *only after* an order of adjudication has been made. The reasons for this departure is explained in the *Notes on Clauses*:

“It is very doubtful whether under the Provincial Insolvency Act the Court would have before it the necessary facts to justify it, in dealing with compositions or schemes prior to adjudication. It is therefore proposed to follow in this respect the procedure under the Presidency

Towns Insolvency Act and allow compositions and schemes *only after* adjudication."

After the filing of an insolvency petition and before the order of adjudication, a composition deed signed by the majority of the creditors was filed for the approval of the Court. Held that the application for approval of composition was premature, because the approval of the court is made dependent on the acceptance of the proposals by a majority in number and three-fourths in value of the creditors whose debts are proved, which can only mean proved after adjudication under sections 24 and 25 of the Act, *In Re. Application of Assansol*, 4 S. L. R. 222: 9 Ind. Cas. There can be no composition before adjudication *Shaw v. Sadiram*, 9 S. L. R. 181: 32 Ind. Cas. 565.

Composition.—A composition is an agreement between the compounding debtor and all or some of the creditors by which the compounding creditors agree with the debtor and (expressly or impliedly) with each to accept from the debtor payment of less than the amounts due to them in full satisfaction of their claims, *Re. Hutton* 1872 7 Ch. App. 723. A deed must in substance be of the nature of a composition, not a conveyance. A composition deed for the benefit of all the creditors, not comprising the whole of the property, is not void, if the transaction is fair and *bona fide* and made in the ordinary course of business or on the pressure of the creditors. It does not become void by the circumstance that it is signed by some only of the creditors and that some are among them whose debts are barred by limitation, *Maluk Chand v. Mani Lal*, 28 Bom. 364. And where the insolvent enters into a composition with his creditors after the passing of a vesting order by the Court and the insolvency petition is afterwards dismissed, such composition deed is valid. *Kothandarama v. Murugesam*, 13 M. L. J. 372: 27 Mad. 7

Notice of Composition.—When a composition is put forward the Court ought to give notice to the creditors. If less than three-fourths of the creditors approve it falls through; if three-fourths of them approve, the Court ought to consider whether it will sanction it. *Safiq-uzzaman v. Deputy Commissioner, Oudh*, 18 O. C. 125: 30 Ind. Cas. 694.

Acceptance by creditors.—A scheme for composition will be considered to be duly accepted by the creditors when the majority in number and three-fourths in value of all the creditors whose debts are proved and who are present either in person or by pleader resolve to accept

the proposal. It is a condition precedent to have the debts proved and to be present in Court either in person or by pleader to signify their acceptance.

"Resolve to accept."—"Where in an insolvency proceeding a proposal is made on behalf of the insolvent for a scheme of arrangement of his affairs the District Judge must under the provisions of Act III of 1907 fix a date for the consideration of the proposal and issue notices to all the creditors and put the scheme before them. If a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader resolve to accept the proposal, it is the duty of the Court to consider whether it shall or shall not approve of the proposal. The fact that the proposal is approved by the creditors does not involve approval by the Court, but if there is no such majority in favour of the proposal it will stand rejected whatever be the opinion of the Court on its merits," *Shafiq v. Deputy Commissioner of Barabanki*, 18 O. C. 125. Under section 27 now 38 of the Provincial Insolvency Act consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment, *Moti Lal Radhakissen v. Ganpat Ram* 23 C. L. J. 220: Ind. Cas. 792.

Under the Provincial Insolvency Act composition before adjudication is an impossibility in spite of the wording of the sections 16 and 27 because there is no provision for proof of debts until after adjudication. Even after adjudication composition is impossible if the debts are not proved for section 27 (2) now 38 (2) makes the assent of the majority in number and three-fourths in value of all the creditors whose debts are proved a *sine qua non*. The assent is not a mere formality. When a composition does not secure for the creditor anything more under it than what they would get if the bankruptcy proceedings had continued, and the composition seems to have the effect of compounding a fraud and if likely to involve the creditors in litigation the Court will not sanction the composition. The Court has a discretion which is recognised in section 27 (6) now 38 (2) of the Provincial Insolvency Act, and the discretion is exercised in the interests of commercial morality, *Re. Application of Fleming Shah and Co. to declare the firm of Sadi Ram Jumnadas Insolvents*, 23 Ind. Cas. 565.

Whose debts are proved.—The proof of debts required by the section means that the creditor shall have proved his debts in some of the ways prescribed by the Act and that his name has been put by the Court in the schedule of creditors, *Chandan Lal v. Khem Raj*, 15 A. L. J. 538: 40 Ind. Cas. 156.

Composition out of Court.—After being adjudicated insolvents appellants proposed a scheme for composition which was rejected: They subsequently represented that a majority of the creditors had accepted half their respective dues in full satisfaction of their claims as suggested in the scheme of composition. Held that these transactions could not be recognised in insolvency proceedings, *Beharilal Sikdar v. Harsukdas Chukmal*, 25 C. W. N. 137: 61 Ind. Cas. 904. "The payment of 4 annar in the rupee is not a payment in full and the arrangement in question could not be treated as composition when the prescribed procedure for it had been followed," *Brijkishore Lal v. Official Assignee, Madras*, 43, Mad. 71: 37 M. L. J. 244: (1919) M. W. N. 795.

39. [27 (7)] If the Court approves the proposal the terms shall be embodied in an order of the Court, and the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, *and the provisions of section 37 shall apply*, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein.

NOTES.

Review.—This is section 27 (7) of Act III of 1907 and corresponds to section 23 (1) of the Bankruptcy Act, 1883 and sec. 6 of the Bankruptcy Act, 1890.

Re-vesting.—Plaintiff having been adjudicated bankrupt his creditors agreed to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy. The amount necessary to pay the composition was deposited with the Official Receiver. The Court, having approved the composition made an order annulling the bankruptcy, *but did not make any order vesting any property of the plaintiff in him or in any other person*. After the annulment of the bankruptcy the plaintiff brought an action to recover a chose in action, which had been legally assigned to him before the receiving order. Held, that upon the order of annulment the chose in action re-vested in him and that he was entitled to sue for it. Younger L. J. in delivering the judgment said "The law empowers the Court to make an order annulling the bankruptcy at a point of time when the composition on

which the annulment is based has not in fact been paid. In these circumstances it is natural that the law should enable the Court by order to vest the property of the bankrupt not only in himself but in such other person as the Court may appoint. An order vesting the property in some other person than the bankrupt may be necessary for the purpose of securing or bringing about the final payment of the composition."

But in case an order annulling the bankruptcy was made but it contained no provision at all with regard to the vesting of the property of the bankrupt in himself or in any body else, the property vests in the bankrupt. "The trustee in bankruptcy held the bankrupt's property for all the purposes of bankruptcy. The only purposes for which the property was by statute vested in him having been fully discharged and the property not having been exhausted, remained in his hands free and discharged from them and all of them. The necessary result is that there is a resulting trust for the late bankrupt, certainly in equity and at law, *Flower v. Mayor of Limeregis Corporation*, 1921 1 K. B. 488.

40 [27 (8)] If default is made in the payment of any instalment due in pursuance of the composition or scheme, or if it appears to

Power to re-adjudge
debtor insolvent.

the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, *re-adjudge* the debtor insolvent and annul the composition or scheme but without prejudice to the validity of any transfer or payment duly made or of anything duly done under or in pursuance of the composition or scheme. When a debtor is *re-adjudged* insolvent under this section, all debts provable in other respects which have been contracted before the date of such *re-adjudication* shall be provable in the insolvency.

NOTES.

Review.—This is section 27 (8) of Act III of 1907, corresponding to section 23 (3) of the Bankruptcy Act, 1883.

If the Court approves of the composition or scheme it may, if in its discretion it thinks fit, annul the adjudication. In case of default, injustice, undue delay, or fraud, an application to adjudge the debtor bankrupt again and annul the composition or scheme may be made by any person interested and not only by the Official Receiver, trustee or creditor. See Sec. 23 (3) of the Bankruptcy Act, 1883.

The provisions of a composition or scheme may be enforced by the order of the Court upon the application of any person interested and disobedience to the order is a contempt of Court, Bankruptcy Act 1890, S. 3 (14). Legal difficulties delaying the execution of the composition or scheme is another ground, Sec. 3 (15) of the Bankruptcy Act, 1890. The Court will not however in the absence of fraud exercise the power of adjudging the debtor bankrupt if it can see plainly that the creditors can gain nothing by it but will do so if there is a probability of gain, *Esparte Moon* 1887 19 Q. B. D. 669.

Effect of Annulment—Unless the Court otherwise directs the annulment of the composition or scheme forthwith and without any special order vests the property of the debtor in the Official Receiver. It has also the effect of discharging any surety for composition from his liability, *Walton v. Cook*, 1888 40 Ch. D. 325.

Discharge.

41. [44 (1), (2)] (1) A debtor may, at any time after the order of adjudication *and shall, within the period specified by the Court*, apply to the Court for an order of discharge, and the Court shall fix a day, notice whereof shall be given in such manner as may be prescribed, for hearing such application, and any objections which may be made thereto.

(2) Subject to the provisions of this section, the Court may, after considering the objections of any creditor and, where a receiver has been appointed, the report of the receiver—

(a) grant or refuse an absolute order of discharge, or

(b) suspend the operation of the order for a specified time; or

(c) grant an order of discharge subject to any conditions with respect to any

earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

NOTES.

Review.—This is section 44 (1) (2) of Act III of 1907, and is based on section 28 of the Bankruptcy Act, 1883, corresponding to section 8 of the Bankruptcy Act, 1890 and Sec. 26 of the Bankruptcy Act, 1914. This section should be read with section 43 (1) and section 10 (2) of the Act. The additions are explained by Sir George Lowndes in his Speech. "The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. As the Usurious Loans Act was introduced for the protection of honest debtors, so an amended Insolvency Act is necessary for the protection of honest creditors against dishonest debtors. I will pursue for the moment the course of the dishonest debtor; he files his petition, and if he is in jail he automatically gets his release under the existing Act and he is practically protected from going to jail again. That is sufficient for him; that is all he wants; he does not want to pay his debts; all he wishes is to escape the penalty of jail. It is not necessary for him to apply for his discharge, and until he applies for it, the Court has practically no power over his misdoings. This is the state of things we have tried to remedy by this Amendment Bill. We propose to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed by the Court. If the insolvent does not apply for his discharge he will lose the protection of the Court altogether. His adjudication will be annulled, and it is provided that he cannot file another petition on the same facts."

Bad Faith.—"It is clear that the question whether the debtor has or has not committed acts of bad faith is to be determined by the Court not at the preliminary stage when the order of adjudication has to be made but at the final stage when the application is made for final discharge," *Udai Chand v. Ram Kumar*, 15 C. W. N. 213: 12 C. L. J. 400, *Samiruddin v. Kadumoyee*, 15 C. W. N. 244: 12 C. L. J. 445.

Effect of Discharge.—Generally it may be said that the effect of an order of discharge is to enable the bankrupt to contract freely and to acquire property, and his trustee in bankruptcy will have no right of intervention. A bankrupt who has obtained his discharge is freed

from his statutory restrictions peculiar to undischarged insolvents. (*Vide* sec. 72). An order of discharge except in the cases mentioned in section 44 has the effect of releasing the bankrupt from all debts provable in bankruptcy, and a promise to pay debt after an order of discharge without fresh consideration is *nudum pactum*, *Heather and Son v. Webb*, 1876 2 C. P. D. 1. "The over-riding intention of the Legislature in all insolvency cases is that the insolvent in giving up the whole of his property shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry." *Re. Gaskill*, 1904, 2 K. B. 478.

Procedure at hearing.—It is the practice for the report of the Official Receiver to be read at the beginning of the proceedings. In addition to hearing the applicant the Court may hear the Official Receiver and any creditor. The Court may put such questions to the bankrupt and receive such evidence as it may think fit and it is the duty of the Judge to take a note of the evidence, *Ex parte Sharp*, 1893, 10 Morr. 114.

Report of the Receiver.—The Report of the Official Receiver is made evidence by the Act only for the purpose of this section and not of any other, *Chinna v. Kumar*, 36 Ind. Cas. 906. An Insolvency Court has no power to set aside or vary a previous order refusing a discharge. No Court has power to set aside an order which has been properly made unless it is given by statute, *Re. Application by Henry Robert Smith*, 9 S. L. R. 132: 32 Ind. Cas. 575.

"May."—The granting of an order of discharge is discretionary with the Court and if it be of opinion that the insolvent may be reasonably expected to possess an income accruing during the time of his insolvency and likely to continue even if the income be from sources which cannot be attached, the Court has full power to order him to contribute out of his future earnings. *Poona Lal v. Kanhya Lal*, 19 Cal. 730. "The Court has an almost unlimited discretion within the statutory limitations as to the order which it will make," *Re. Banker, Ex parte Constable and Jones*, 1890, 25 Q. B. D. 285. "In considering an application for discharge the Court will have regard not to the interest of the creditors alone but also to the interests of the public and commercial morality," *Re. Badcock*, 1886, 3 Morr. 138.

Statutory Limitations.—The statutory limitations to the discretion of the Court as provided by this section are as follows: The Court may either (1) grant an absolute order of discharge or (2) absolutely refuse order of discharge or (3) suspend the operation of discharge for

a specified period or (4) grant an order of discharge subject to any condition with respect to any earnings or income which may afterwards accrue due to the insolvent or with respect to his self-acquired property or (5) exercise the above powers of suspending and of attaching conditions to a bankrupt's discharge concurrently.

Sub-section (2).—For circumstances under which the Court can refuse or suspend the absolute order of discharge, *vide* Sec. 42 *infra*.

“The function of the Court acting under Ch. XX of the Civil Procedure Code was to compel the insolvent-debtors to pay their debts if it could, either by its own compulsory process or where that could not be used, by withholding from them when it had the power of doing so the relief to which they might otherwise be considered entitled. The granting of an order of discharge under that chapter was to a certain extent discretionary with the court, and if the Court was of opinion that an insolvent might reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even if such income be from sources such that it could not be attached, it ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent and not rather stay its hand and require him as a condition of such a discharge to satisfy it by payment on account of its debts that he really desires, so far as he can, honestly to discharge his debts that he owes.’ A *Gajawal* who was in receipt of considerable offerings made by pilgrims was declared insolvent and discharged by the District Judge. Held, that the Court had power to withhold the discharge until the insolvent had satisfied it by payment on account of his debts that he really desired to discharge his debts,” *Poona Lal v. Kanhyu Lal*, 19 Cal. 730.

Secured creditors.—An order of discharge does not affect the rights of a secured creditor against the insolvent, *Sridhar Narayan v. Atma Ram*, 7 Bom. 455.

Conditions.—An adjudicated insolvent obtained on the 2nd October 1912 an order of discharge on the following terms, “it is ordered that the insolvent's discharge be suspended for one year and that he be discharged as from 2nd October 1913.” No final order of discharge was made. The insolvent having acquired property in 1916-17 the Official Assignee claimed the property for division amongst the insolvent's creditors. Held, that the order of discharge became operative by itself on the 3rd October 1913 and the claim of the Official

Assignee be negatived, *Murad Ally v. Lang*, 21 P. L. R. 980. The order of discharge subject to conditions cannot be made unless there is some reasonable probability of the insolvent's coming into possession of funds, *Ex parte James*, 8 Morr 19. Where an insolvent after obtaining his personal discharge inherits property from his father, there must be evidence that his income is more than sufficient to keep his family in good circumstances and to enable him to meet the necessities of himself and his family, *Abdul Kureem v. Official Assignee*, 28 Mad. 168. An order of discharge of an insolvent on condition that he should, subject to his right of an allowance of Rs. 25 a month for the maintenance of himself and his family place at the disposal of the Court all property he might afterwards acquire does not amount to such a discharge as is referred to Sec. 33 (3) *supra*. *Sivasubramania v. Thethecuppa*, 45 M. L. J. 166: 1923 M. W. N. 895.

Suspend.—Before the Court makes a suspension of discharge there must be reasonable prospects that some available funds will be forthcoming. An insolvent who though unable to pay all his debts at the time of the application for discharge has some reasonable expectation that he would acquire property subsequently cannot be given an unconditional discharge. In *Re. Jones*, 24 Q. B. D. 589. The discretion to suspend the operation of the order of discharge for specified time or to grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent is controlled by the provisions of Sec. 42 of the present Act. *Debi Prasad v. Allen Grant*, 39 Ind. Cas. 916.

Sec. 26 of the Bankruptcy Act, 1914, provides by sub-section (2) that on the hearing of an application for discharge the Court may either grant or refuse an absolute order of discharge or suspend the operation of the order for specified time or grant an order subject to any condition with regard to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. It is also provided that the Court shall refuse the discharge in all cases when the bankrupt has committed any misdemeanour under the Act connected with his bankruptcy, and shall on proof of any of the facts thereafter mentioned, either (1) refuse the discharge; or (2) suspend his discharge for a period of not less than 2 years; or (3) suspend his discharge until a dividend of not less than 10 shillings in the £ has been paid to the creditors. But where proof had been made of some of these facts, *viz.*, that the

bankrupt's assets were not of a value equal to 10 s. in the £ on the amount of the unsecured liabilities and the Registrar made an order suspending the discharge until the debtor has paid 15 s. in the £ to his creditors, held, that there was no jurisdiction under this section to make the order. *In Re. Kutner*, 1921 3 K. B. 93.

Foreign Court.—The discharge of a debtor under the Bankruptcy Law of Ceylon operates as a discharge of a debt payable by the insolvent for which there was an enforceable cause of action in Ceylon even though the place of performance or payment may have been fixed in British India, *Magudu Pillay Rowther v. Muhammadhu Rowther*, 9 Mad. L. W. 535. The Insolvency Court in Bombay has no jurisdiction to restrain a decree-holder from filing a suit against an insolvent who has obtained his discharge in an Insolvency Court, in a foreign state, within whose jurisdiction the insolvent has property, for recovering a debt in respect of which the discharge has been obtained. The order of discharge granted by the Insolvent Court in Bombay would be recognised by all Courts in British Empire, but there is no obligation on Courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order, *Lahkmiram v. Punamchand*, 22 Bom. L. R. 1173.

Appeal.—An appeal lies against an order on application for discharge under Sec. 75 (2), Sch. I., *infra*.

42. [44 (3)] (1) The Court shall refuse to grant an absolute order of discharge, *under Section 41* on proof of any of the following facts, namely:—

Cases in which Court must refuse an absolute discharge.

- (a) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;
- (b) that the insolvent has omitted to keep such books of account as are usual

and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency;

- (c) that the insolvent has continued to trade after knowing himself to be insolvent,
- (d) that the insolvent has contracted any debt provable under this Act without having at the time of contracting it any reasonable or probable ground of expectation (the burden of proving which shall lie on him) that he would be able to pay it;
- (e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;
- (f) that the insolvent has brought on, or contributed to his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs;
- (g) that the insolvent has, within three months preceding the date of the presentation of the petition, when unable to pay his debts as they became due, given an undue preference to any of his creditors;
- (h) that the insolvent has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditors;
- (i) that the insolvent has concealed or removed his property or any part thereof, or has been guilty of any other fraud or fraudulent breach of trust.

[44 (4)] (2) For the purposes of this section, the report of the receiver shall be deemed to be evidence; and the Court may presume the correctness of any statement contained therein.

[44 (5)] (3) The powers of suspending, and of attaching conditions to, an insolvent's discharge may be exercised concurrently.

NOTES.

Review.—This is section 44 (3) of Act III of 1907 and corresponds to sec. 8 of the Bankruptcy Act, 1890.

This section provides for the exceptions to the exercise of discretion to grant discharge under sec. 41 (2) and sets forth the grounds on which the application for discharge may be opposed, *In Re. Hormusji Ardesir*, 17 Bom. L. R. 313.

The discretion to grant the order of discharge is limited by two statutory exceptions: (1) the Court must refuse the discharge absolutely in all cases where the insolvent has committed any misdemeanour connected with his bankruptcy and (2) the Court must on proof of any of the facts mentioned in this section either refuse the discharge absolutely or suspend the discharge for a specified period or suspend the discharge until a dividend of not less than 8 annas in the rupee has been paid. The various misdemeanours limiting the order of discharge are, as mentioned in the different sub-sections, and are bodily taken from the English Bankruptcy Act.

Clause (a).—An insolvent's assets are deemed to be of a value equal to 8 annas in the rupee on the amount of his unsecured liabilities when the Court is satisfied that the property has realised or is likely to realise or with due care in realisation might have realised an amount equal to 8 annas in the rupee. *Cf.* Section 8 (4) of the Bankruptcy Act, 1890. The direction given to the Court by the first proviso to suspend the discharge until a dividend of not less than 10 s. in the £ have been paid to the creditors does not empower the Court to suspend that discharge until a larger dividend has been paid. To give such a power to the Court, and thus, in effect, compel the debtor to work for his creditors to an extent beyond the prescribed sum as a condition of his discharge, is not to be implied from the statute. *In Re. Kutner*, 1921 3 K. B. 93 C. A. When the insolvent's assets were not of a value equal to eight annas in the rupee and it was also found

from the report of the Receiver that the insolvent, so far from helping the Receiver to pay his debts, had rather obstructed him, the order refusing discharge was perfectly reasonable. *Jagmohan Sing v. Deputy Commissioner, Fyzabad*, 80 Ind. Cas. 54.

Clause (b).—Books of Account.—*Financial position* means financial position regarding the trade or business carried on and generally a trader who kept proper books of his trade but not of his personal purchases was held not under obligation to keep books relating to his personal purchases. A man out of business need not keep books at all and if a business man keeps a business book, he need not put down his private transactions in them, *Re. Mutton*, 1887, 19 Q. B. D. 102.

Clause (c). Trade.—"What constitutes a *trader* depends upon the definition given to that term in sec. 65 of the Statute, 25 & 13 Vict. Cl. 106, which is rendered applicable to this country by sec. 9 of the Indian Insolvency Act. In the enumeration of traders given in sec. 65 of that Act are persons using the trade of merchandise.....or who seek their living by *buying and selling*.....or by workmanship of goods or commodities. A manufacturer who works with raw materials is a trader. A person who merely produces an article from the soil is not a trader because there is not that *buying and selling* necessary to constitute him a trader and also because the article which he produces and sells is not produced by the workmanship of goods or commodities. A tea-planter who produces dried tea leaves is a trader; an indigo planter is a trader." *In Re. Momet*, 21 Cal. 1018.

"A man has a perfect right to determine that he will go on with a business so long as he is solvent although it is a losing business. But the moment he becomes insolvent he is going on at the risk of the creditors," *Re. Stinton*, 1887, 4 Morr. 242.

Knowledge.—It is essential that there should be a knowledge of insolvency. If a trader has kept proper books as provided in clause (b) *supra* he will not as a rule be able to say that he was ignorant of his insolvency, *Re. Heap, Ex parte Board of Trade*, 4 Morr 314.

Clause(d).—For 'debts provable' see notes under Sec. 33 & 34.

Expectation.—*In Re. Cowie*, 5 Cal. 70, held, "they are pointed not at the case of a man who incurs a debt knowing that he cannot pay his debts generally but at that of a man who incurs a debt knowing that he cannot repay *that debt*."

Clause (f).—This is section 8 (3) of the Bankruptcy Act, 1890. *Rash and Hazardous Speculation.* If a man advances money on that

which may or may not succeed it is speculation. To bring the case within the Act the speculation must be rash as well as hazardous. Lopes L. J. in *Re. Exparte Keays*, 1891, 9 Morr 12, observed. "In my opinion a speculation which no reasonably careful man would enter into having regard to all the circumstances of the case is a rash and hazardous speculation; and by all the circumstances of the case I mean his own means and all the surrounding circumstances connected with the matter." Thus trading to the extent of thousands where the trader has no capital to meet losses is rash and hazardous speculation. So acceptance by a banker of foreign bills of exchange to large amounts after failure of the foreign bank to meet earlier acceptances is rash and hazardous speculation, *Re. Braginton*, 14 L. T. 277. So speculative dealings by a share broker largely on his own account, *Re. Wilson*, 14 L. T. 492. Lord Wesbury L. C. defined a 'rash' speculation as a speculation such as no reasonable man would enter into, *Exparte Downman*, 1863, 32 L. J. 49. "Rash and hazardous" must be looked at with regard to all the circumstances." The allegation that the transaction was a rash and hazardous speculation must be definitely alleged and strictly proved, *Re. John Brown & Co.*, 1906, 22 T. L. R. 291.

If a man borrows money, he is responsible for the payment of it whether the man who lends him money is foolish or otherwise. Under the Provincial Insolvency Act, the Court is enabled to confer on debtors the benefit of release from their debts, but this benefit was intended for the honest debtor who by reason of misfortune is unable to pay his debts. The conduct of the seeker of the benefit, not the conduct of creditors is what has to be considered, *Kalleappa Chetty v. Maung Kyme*, 5 L. B. R. 189. See also *In Re. Harmusji Ardeshir*, 17 Bom. L. R. 313.

Unjustifiable extravagance.—A man is not bound to keep up appearances but to pay up debts and if his property will not allow of his living at the particular rate he has been accustomed to live at, then his plain duty is to reduce his scale of living and not to go on living out of the money of his creditors, *In Re. Stainton*, 4 Morr 242.

See also Notes under Sec. 54 *infra*.

Effect of order of refusal.—The refusal of discharge to an insolvent is not necessarily a determination of the insolvency proceedings, and in spite of such refusal, the bar against the commencement of the suit against the insolvent after the adjudication order laid down by Sec. 28 (2) continues to operate and a creditor of the insolvent is not en-

titled to commence a suit for the recovery of a debt against the insolvent without the leave of the Insolvency Court. The plaint in such a suit must be rejected. *Rowe & Co. v. Tanthean Taik*, 84 Ind. Cas. 909.

43. [New] (1) *If the debtor does not ap-*

Adjudication to be annulled on failure to apply for discharge.

pear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of Section 37 shall apply accordingly.

(2) *Where a debtor has been released from custody under the provisions of this Act and the order of adjudication is annulled under sub-section (1), the Court may, if it thinks fit, re-commit the debtor to his former custody, and the officer in charge of the prison to whose custody such debtor is re-committed shall receive such debtor into his custody according to such re-commitment, and thereupon all processes which were in force against the person of such debtor at the time of such release as aforesaid shall be deemed to be still in force against him as if no order of adjudication had been made.*

NOTES.

Review.—The section is new, and its introduction is explained by Sir George Lowndes in his Speech and his Statement of Objects and Reasons: “The main defect in the old Act was that it lent itself very largely to the devices of dishonest debtors. I will pursue for a moment the course of the dishonest debtor; he files his petition, and if he is in jail he automatically gets his release under the existing Act, and he is practically protected from going to jail again. This is the state of things that we have tried to remedy by this Amendment Bill. We propose in the first place to make it compulsory that every petitioning insolvent should apply for his discharge within a time to be prescribed

by the Court, which we hope will in most cases be a fairly short one. If the insolvent does not apply for his discharge and it must be remembered that his doing so enable the court to deal with any malpractices he may have committed, he will lose the protection of the Court altogether. His adjudication will be annulled, and it is proposed that he cannot file another petition on the same facts.”—*Speech*. See also *Statement of Objects and Reasons*, paragraph 3.

Automatic Annulment of the Adjudication Order.—In *Ex parte Ramkishna Misra*, 4 I. L. R. Pat. 51: (1925) A. I. R. (P.) 355, it has been held that the debtor has complete discretion to apply for discharge when he likes provided he applies within the period specified by the Court in the order of adjudication passed under Sec. 27. The word “shall” in section 41 of the Act imposes a duty upon the insolvent, the breach of which involves the consequences pointed out in Sec. 43. The provision in Sec. 43 is *mandatory* and the Court has no discretion to enlarge the period fixed by the Court for an application for an order of discharge. The provision was intended to remedy the defect in Act III of 1907 under which the conduct of the debtor never came under the scrutiny of the Insolvency Court. It is a new provision and should receive strict interpretation. Whereas in *Arunagiri Mudaliar v. Kandaswamy Mudaliar*, 83 Ind. Cas. 955, 1924 M. W. N. 331: 1924 A. I. R. (Mad) 635 it has been held that the power conferred by Sec. 27 (2) of the Act to extend the time fixed for applying for discharge is not exhausted by the period originally fixed having expired. There is nothing in the Act to prevent the Court from extending the time after the period originally fixed has expired, under Sec. 43 of the Act. Sec. 148 C. P. Code is applicable to the insolvency proceedings by virtue of Sec. 5 (1) of the Provincial Insolvency Act and would justify an extension of time in such a case even after the expiry of the period originally fixed. But Waller, J. *dissenting*, held that Sec. 43 is absolutely *peremptory* in its terms and directly the Court is informed of the insolvent’s omission to apply for discharge within the time fixed, the only course open to it is to annul the adjudication. No application for extension of time can lie after the expiry of period originally fixed. Sec. 148 C. P. Code is applicable to insolvency proceedings only so far as it does not conflict with the provisions of the Provincial Insolvency Act.

The Calcutta High Court in *Abraham v. Sukeas*, 51 Cal. 337: 81 Ind. Cas. 584; 1924 A. I. R. (Cal.) 777, has held that “it is true that

Sec. 43 provides that the order of adjudication *shall* be annulled; but that seems to indicate that it is to be annulled at the instance of the opposite party, or by the Court itself, and does not stand cancelled automatically on the expiry of the period. We think that under Sec. 27 (2) the Court has the power to extend the time even after the expiry of the period of the order for discharge."

44. [45] (1) An order of discharge shall not
 Effect of order of discharge. release the insolvent from—

- (a) any debt due to the Crown;
- (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party;
- (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party; or
- (d) *any liability under an order for maintenance made under Section 488 of the Code of Criminal Procedure, 1898.*

(2) Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts *provable under this Act.*

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him.

NOTES.

Review.—This is Section 45 of Act III of 1907, and Section 30 of the Bankruptcy Act, 1883.

C. P. C. and Act III of 1907.—"Under Sec. 352 of the C. P. C. 1882 the relief was limited to debts entered in the schedule: and if a creditor did not choose to have his debts scheduled the discharge would not preclude him from executing his decree. Section 357 of the Code did not protect an insolvent from arrest in respect of judgment-debts not appearing in the schedule—his property could always be attached and sold. It is therefore proposed to adopt the provisions of the English Law which enables the Courts to declare that the relief when

granted will absolve the debtor from all claims provable in insolvency with the exception of those due to the Crown or tainted with fraud."

—*Notes on Clauses to Act III of 1907.*

Clause (a) Crown Debts.—In determining whether, or not a debt falls under the denomination of a crown debt "the question is not in whose name the debt stands but whether the debt when recovered falls into the coffers of the State," *Judd v. Secretary of State*, 12 Cal. 445. Crown debts include all debts, penalties fines due by the insolvent to Government and all assessed taxes, land tax, property or income tax assessed on the insolvent; also court-fees payable by a person suing in *forma pauperis*, *Ganoda v. Buttokristo*, 30 Cal. 1040: 10 C. W. N. 857. So a judgment-debt due to the Secretary of State arising out of a crown debt, *Judah v. Secretary of State, supra*. The reason why crown debts are paid before every other debts is that the title of the king shall be preferred to that of the subject and that interests of the individuals are to be postponed to the interests of the community. *New South Wales Taxation Commissioner v. Palmer*, 1907 A. C. 179.

Clause (b).—This is section 30 (1) of the Bankruptcy Act, 1883. "Where the bankrupt had knowingly put forward false statements in a prospectus, even if he had not knowledge of the true facts, it was a fraudulent act for him for his own advantage to issue a statement which is false in fact being utterly careless whether it was true or not," *Duce and Duce*, 1889, 6 Morr. 290. "A company promoter who had made a secret profit was guilty of fraud and breach of trust and the debt incurred to the company was a debt incurred by fraud and breach of trust therefore not released by an order of discharge," *Emma Silver Mining Co. v. Grant*, 1889 17 Ch. D. 122. See also *Panangupalli v. Ramchandra*, 28 Mad. F. B. 152: 15 M. L. J. I, It is necessary that the insolvent should be personally implicated in the fraud or fraudulent breach of trust. So a liability as partner for the fraud of a co-partner would not come under this section, *Cooper v. Prichard*, 11 Q. B. D. 351.

Clause (d).—This clause is new. Its introduction is thus explained in the *Notes on Clauses*: "The effect of existing Section 45 is to release a discharged insolvent from liability under an order of maintenance made under Sec. 488 of the Code of Criminal Procedure, 1898, and in this respect the section is in conflict with Section 45 of the Presidency Towns Insolvency Act. It is proposed to bring it into accord with the latter Act."

Formerly there was divergence of opinion as to whether an insolvent who had obtained an order of discharge was released from his liability to pay maintenance or arrears of maintenance as ordered by a court. In *Tookee Bibi v. Abdul Khan*, 5 Cal. 536, held arrears of maintenance included in the schedule is a debt. But in *Pamanmal v. Hemanmal*, 35 Ind. Cas. 451, it was held that maintenance ordered to a wife is not a debt provable under the Act and hence the order of discharge will not release the insolvent from the liability to pay arrears of maintenance and to be imprisoned for non-payment. This conflict in the law has been set at rest by the enactment of this new clause (d). But in *Halfhide v. Halfhide*, 50 Cal. 867, it has been held that the fact that a husband who is in arrears of maintenance has been adjudicated insolvent under Sec. 27 of the Prov. Insolvency Act, V. of 1920, is conclusive as long as the order for adjudication stands, that he is unable to pay the amount due and he is therefore not guilty of *wilful neglect* within Sec. 488 (3) of the Cr. P. Code.

Sub-section (2).—In this connection the difference in effect of the order of discharge between the present Act and C. P. C. 1882 should be noted. In *Harapriya Debi v. Shama Charan*, 16 Cal. 592 it was held “we think it is necessary for us to notice what does at first sight appear to be somewhat anomalous in the provision of Sec. 352 of the C. P. C. Although an insolvent may come into Court seeking to be released from his debts and although the object of these proceedings is to release him from those debts, if a creditor does not come in and prove his debts this would prevent an insolvent acquiring the relief that the court contemplates giving him. This is unfortunate.” The discharge of the insolvent did not operate as a discharge of the debts under Sec. 357 of the C. P. C. whereas under Sec. 45 (2) of Act III of 1907, now Sec. 44 (2) an order of discharge shall release the insolvent ‘from all debts provable under the Act’ whether the creditors choose to come in and prove their debts or not. Sec. 45 (2) now Sec. 44 (2), gives a release to the insolvent at the time of his discharge from debts entered in the Schedule. But after adjudication and before discharge Sec. 16 (2) b of the old Act absolutely prohibited all creditors whether in the Schedule or not from taking execution proceedings against the person or property of the insolvent except with the leave of the Court. Now under Sec. 28 (2) all proceedings against the property of the insolvent are prohibited but not process against the person of the insolvent. *Natesa Chettiar v. Annamalai Chettiar*, 73 Ind. Cas. 213: 1923 A. I. R. 487 (Mad).

For what debts are provable under the Act *vide* notes under Sec. 33 and 34.

Sub-section (3).—"Although a co-partner with the insolvent is not discharged from liability by an order of discharge in respect of the insolvent, the insolvent is released from liability both in respect of the separate debts and partnership debts included in the Schedule," *Ex parte Maund*, 16 Eq. 615. A certificate of discharge granted to one of several joint-grantors of an annuity discharges the bankrupt and not the others, *Buxtor v. Nichol*, 4 Taunt 90.

Effect of the order of Discharge outside India.—An order of discharge does not operate outside British India so as to prevent recovery of the debt there out of the property there which has not been taken by the Receiver. *Lakkhram Kevalram v. Punamchand*, 45 Bom. 550.

PART III.

ADMINISTRATION OF PROPERTY.

Analysis.—The chapter deals with the administration of the property of the insolvent either by the Court or through the Receiver appointed by the Court. Under Sec. 20 the Court when making an order admitting the petition may, and when the debtor is the applicant shall, appoint an interim receiver of the property of the debtor or any part thereof, and may direct him to take immediate possession thereof or any part thereof. And under Sec. 28 on the making of an order of adjudication the whole of the property vests in the Court or in the Receiver appointed by the Court to be divisible amongst the creditors and the insolvent shall aid to the utmost of his power in the realisation of his property and distribution of the proceeds amongst the creditors. The provisions under this chapter are chiefly concerned with (1) proof of debts, Secs. 45-50, (2) effect of insolvency on antecedent transactions, Secs. 51-55, and (3) the realisation and distribution of the property of the insolvent, Secs. 56-67.

Method of proof of debts.

45. [29] A creditor may prove for a debt not payable at a future time. Debt payable at a future time. payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration of a dividend to the time when the debt would have

become payable, according to the terms on which it was contracted.

NOTES.

Review.—This is Sec. 29 of Act III of 1907 and is based on Rule 21 of Schedule II of the Bankruptcy Act, 1883. The enactment of this section in Act III of 1907 was thus explained in the Notes on Clauses to that Act: "It may be doubted whether claims payable at a future time is a debt for the purpose of rateable distribution. Rule 21 of the Second Schedule of the Statute of 1883 has accordingly been adopted so as to include such claims."

A creditor may prove for a debt not payable at the date of the act of bankruptcy and receive dividends thereon equally with other creditors deducting only thereout a rebate of interest at 5 per cent. per annum from the date of declaration of dividend to the time when the debt would become payable according to contract. If the debt is payable with interest then the debt is to be proved as a present debt deducting a rebate of interest at 5 per cent. as above mentioned. Then the liability to pay interest is to be valued and proved for that value, and then he will be entitled to a dividend on it without rebate, *Re. Brown and Wingrove, Ex parte Ador*, 1891, 2 Q. B. 574.

46. [30] Where there have been mutual dealings between an insolvent and a creditor. proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

NOTES.

Review.—This is Section 30 of Act III of 1907 and corresponds to Or. XXI r. 18 of the C. P. C. 1908.

"Mutual."—"By Mutual credits I conceive to mean simply reciprocal demands which must naturally terminate in a debt. There is no demand or debt until dishonoured," *Miller v. National Bank of India*, 19 Cal. 146. The mutual dealings must be between the same parties. So a joint debt cannot be set off against a separate debt nor a separate debt be set off against a joint debt, *Bishop v. Church*, 3 Atk 691. The right of set-off will be found to exist not only in cases of mutual debts and credits but also where the cross demands

arise out of one and the same transaction or are connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit, *Stephen Clark v. Ruthnavello Chetty*; 2 M. H. C. R. 296. "The object of a set-off is not merely to avoid cross-actions but to do substantial justice and prevent the great injustice which would arise if a person who is insolvent's creditor on one account and his debtor on another is compelled to pay the entire amount due by him, receiving only a dividend on the amount due by him," *Seth Radhakissen v. Firm of Gangaram Radha*, 95 P. L. R. 1914: 23 Ind. Cas. 927. Mutual credits that may be set off include credits that have a natural tendency to terminate in debts, and not merely credits which must necessarily terminate in debts. So claims in respect of bills and notes discounted for the insolvent before insolvency but dishonoured by the makers after insolvency may be set off, *In the matter of Canthom*, 33 Mad. 53. See also *Chengalvaraya v. Official Assignee, Madras*, 33 Mad. 467: 7 M. L. T. 207. This section is application only in case of mutual dealings. *Chetandas Mohandas v. Ralli Brothers*, 1925 A. I. R. (S.) 153.

Set-off.— In *Baker v. Lloyds Bank, Ltd.*, 1920 L. R. 2 K. B. 322, defendants acted as Bankers for a firm up to February 3, 1914, when the firm being insolvent by deed assigned all their properties to the plaintiff as trustee for their creditors. The deed provided that payments to the creditors should be made upon the basis of a bankruptcy distribution of the property and that secured creditors should have the same rights as under a bankruptcy. At the date of the deed the firm had £2943 to the credit of their current account in the defendant bank, and the Bank held certain shares as security for an advance to the firm. These shares were subsequently sold by the Bank who realised £812 in excess of the amount of the advance to the firm. Before Feb. 3, 1914, the firm had discounted with the bank a number of bills of exchange which matured after that date, and in respect thereof the firm became debtors of the bank to the amount of £19941. In an action by the plaintiff as trustee under the deed to recover from the bank the two sums of £2934 and £812 the bank claimed a lien on those sums and also to set off a sufficient portion of £1941 against those sums. Held, that the bank's claim was right on both points.

Palmer & Co., borrowed a large amount as a collateral security accompanied with a written agreement authorising the Bank in default of payment of the loan by a given day "to sell the Company's

papers for the re-imbursement of the Bank rendering to Palmer & Co., any surplus." Before default Palmer & Co. was declared insolvent. At the time of the adjudication the Bank was also the holder of 2 Promissory notes of Palmer & Co. which they have discounted for them before the transaction of the loan. The time for re-payment of the loan having expired, the Bank sold the Company's papers and after satisfying the principal and interest due on the loan, there was a considerable surplus. In an action by the Official Assignee of Palmer & Co. to recover the amount of the surplus, held that the Bank could not set off the amount of the promissory notes, as "the deposit of Palmer & Co. did not amount to a credit given, and Palmer & Co. giving the Bank a power to possess itself the surplus after repaying its own debt when the debt shall become due cannot be said to be giving a credit to the Bank," *James Young & ors. v. Bank of Bengal*, 1 M. I. A. 87 distinguished in *Alsagir v. Currie*, 1844, 12 M. & W. 751 and also in *Naoroji v. Chartered Bank of India*, 1868, L. R. 3 Ch. Prac. 444 on two grounds, (1) that in 1 M. I. A. 87 the deposit was not simply a delivery of security for the purpose of receiving the money but a deposit of the security with power of sale, and (2) that though there was a power to sell and to pay over the surplus it was only *in presenti* a bailment. This case was distinguished also in *Miller v. Beer*, 6 C. L. R. 294 on the ground that each party there actually owed a debt to the other though the exact amount of one debt was in dispute, whereas in 1 M. I. A. 87, there was a deposit of Government Securities by one party for a specific purpose and that there was no mutual credit and no mutual debt. The leading case of *Rose v. Hart*, 2 Smith's Leading Cases, 9th Ed. 324, shows that the credit must in its nature terminate in a debt or as Byles J. puts it in *Naoroji v. Chartered Bank*, *supra*, "mutual credit means simply reciprocal demands which must naturally terminate in a debt." See also cases under Or. VIII r. 6 & Or. XXI r. 18 of the C. P. C.

It should be noted that to constitute a case of set-off the amounts recoverable by each against the other must (1) be ascertained (2) be legally recoverable and (3) be between parties of the same character. Or VIII r. 6, C. P. C. *Ascertained sum* does not mean a sum *admitted* but a sum the amount of which is known. *Edward v. Ramdin*, 14 C. W. N. 170. The words *ascertained sum* used in Or. VIII C. P. C. are used to exclude such items as liquidated damages and *mesne profits* the amounts of which are not ascertainable until the Court

determines them. Where a defendant says that there were definite sums of debit and credit between the parties and that on the date of the suit a definite known balance, the amount of which is given in the written statement was due to the Defendant from the plaintiff, the sum so claimed is an *ascertained* sum for which a set-off is allowed. *Har Prosad v. Ram Swarup*, 82 Ind. Cas. 340.

Joint Debt.—A joint debt cannot be set off against a separate debt under the Provincial Insolvency Act. Thus where A & B are sued by a bank on a joint promissory note, B cannot set off against the bank's claim on the note, an amount admittedly due to him from the bank on his deposit account, since the dealings on the deposit account and on the promissory note are of a different character and do not come within the term "mutual dealings." *Trimbak Gangadhar v. Ramchandra*, 63 Ind. Cas. 906: 23 Bom. L. R. 537.

Accounts.—The Act is silent up to what date "an account shall be taken of what is due from one party to the other." Accounts have to be taken till the date of the order of adjudication, *Ex parte Barrel*, 34 L. J. 41.

47. [31] (1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and

shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

NOTES.

Review.—This is section 31 of Act III of 1907.

Secured Creditor.—For the meaning of the term see sec. 2 (e) and sec. 9 (2) and notes thereunder. It is well-established that a secured creditor stands on a different footing from that which is ordinarily occupied by unsecured creditors. The position of a secured creditor is dealt within Secs. 28 (6) and 47. Sec. 28 (6) is very emphatic in providing that the provisions of the Provincial Insolvency Act should not in the least touch a secured creditor who is entitled to deal with his security in any way he chooses unhampered by the provisions of the Provincial Insolvency Act, subject to sub-section 3 of sec. 28. "Speaking broadly, a secured creditor may do one of the three things: he may enforce his security and prove for the balance that may be due to him; or he may relinquish his security for the general body of creditors and prove for the whole debt that may be due to him; or he may value his security and receive a dividend for the balance that may be due to him subject to the right of the Court to redeem the security. He may also ignore the Insolvency Court altogether in which case he must be content with his security and will be debarred from claiming any dividend of his security if his security should prove insufficient." *Sant Prasad Singh v. Sheo Dutt Sing*, I. L. R. 2 Patna 724. Where any part of the insolvent's property is subject to a mortgage, the value of the insolvent's right to redeem that property can only be his assets available for distribution. If the Receiver sells the property free from the mortgage and realises the purchase money the whole of it is not assets available for distribution but only such part as remains in his hand after paying off the mortgagee. *Sridhar v. Atmaram*, 7 Bom. 455, *Sridhar v. Krishnaji*, 12 Bom. 272, *Sheoraj Sing v. Gauri Sahay*, 21 All. 207, *Mokshagunam v. Ramkrishna*, 70 Ind. Cas. 357, *Govinda v. Abdul Kadir*, 1923 A. I. R. 150 (Nagpur). But it must be noted that his rights under this section must necessarily be postponed when the legality of his alleged charge is called in question. *Moti Ram v. F. H. Rodwell*, 21 A. L. J. 32: 1923 A. I. R. 150 (All.).

Rights of Secured Creditors.—As has been laid down in Sec. 28 (6), a secured creditor's remedy against the estate of an insolvent is not

affected in any way by the insolvency proceedings. He has the absolute right of realising his security, i.e., he may realise his dues from the Insolvency Court or he may enforce his mortgage, charge or lien by fore-closure or otherwise without the leave of the Insolvency Court, *Badri Das v. Chetty*, 45 Ind. Cas. 918. "The discharge of the insolvent did not affect the mortgage-debt, and the Receiver is bound to pay off the mortgage even when the debt has not been scheduled in the insolvency proceedings, the position of the mortgagee being essentially different from that of the unsecured creditor," *Sridhar v. Atmaram*, 7 Bom. 455. See also *Harapriya v. Shamacharan*, 16 Cal. 592, *Sheoraj Singh v. Gouri Sahai*, 21 All. 227, *Sridhar v. Krishnaji*, 12 Bom. 272, *Bank of Upper India v. Administrator General, Bengal*, 45 Cal. 653.

Is Receiver a Necessary Party?—"Secured creditors are entitled to deal with their security in the same manner as they could have been entitled to deal with it if Sec. 28 had not been passed." Sec. 28 (6). In the earlier part of this section (Sec. 28 (2)) provision is made for the vesting of the property in the Court or the Receiver. It follows therefore that a secured creditor is entitled to deal with his security as though there had been no vesting in the Court or in the Receiver. It is therefore not necessary for the Court to add the Receiver as a party to a mortgage suit. Under one of the provisions of Sec. 28 the interest of the insolvent vests in the Court where no Receiver is appointed. "Can it be said that the mortgagee was bound to sue the Court in order to enforce his mortgage? That would be clearly absurd. The reasonable construction of Sec. 28 (6) must therefore be that a secured creditor is not in any way affected by the provisions of that section and for the purpose of enforcing the mortgage it should be held that title to the property remained with the mortgagor." *Jagannath Marwari v. Kalachand*, 41 C. L. J. 290.

Arrears of Rent.—A decree for arrears of rent of an under-tenure was obtained against a tenant who became insolvent and his tenure became vested in the Official Assignee. An application was made under the Rent law for an order that the tenure should be sold for its own arrears. The Official Assignee objected and contended that the decree-holder's only remedy was to prove in the insolvency for the amount of his debt. *Held*, that whether the arrears of rent became due before or after the insolvency of the judgment-debtor the decree-holder was entitled to sell the tenure in execution of his decree, *Chundra Narain*

Sing v. Kishen Chand Golicha, 9 Cal. 855. This very point was raised in the Madras High Court in the case of *China Subraya v. Kudaswami Reddi*, 1 Mad. 59, in which it was held that the interest of the patta-holder is one dependent upon his payment of rent and if he does not pay his right to do it ceases and becomes saleable for the arrears. By virtue of the provisions contained in Sec. 101 of the Oudh Rent Act a landlord is a secured creditor of his tenant for his rent and when the tenant becomes insolvent the landlord is entitled to be paid the rent due to him out of the proceeds of the sale of crops before distribution is made amongst the creditors. *Bishambhar Nath v. Rukha*, 81 Ind. Cas. 647.

Mortgages.—A mortgagee of the property of the insolvent is not a person proving in the bankrupt's estate; he is a secured creditor and is entitled out of the sale of the mortgaged property to be paid his principal and interest at the contractual rate up to the date of payment and costs, *Jugal Kishore v. Bankim Chandra*, 17 A. L. J. 480: 51 Ind. Cas. 192. The owner of a printing and publishing business who owed to a bank entered into an agreement with the bank to the effect that all books then in stock and all books to be published thereafter were to be made over to the bank and that a commission at a certain rate was to be allowed to the bank on the sale of the books, and the sale proceeds were to be credited to the debtor's loan account. Held, that the Bank was entitled to rank as a secured creditor of the owner of the printing and publishing business on the insolvency of the business, *Allahabad Trading and Banking Corporation v. Ghulam Muhammad*, 37 All. 383. In *Purshotam Das v. E. B. David*, 13 A. L. J. 893: 30 Ind. Cas. 779, held that a decree-holder was a secured creditor, the money set apart for him as a condition precedent for the setting aside of an *ex parte* decree being a security to him which he might draw and appropriate to his own use.

Unpaid Vendor.—An unpaid vendor of immoveable property has only an equitable right under Sec. (4) (b) of the Transfer of Property Act to recover the purchase money from the property that he has sold and does not obtain the status of a secured creditor of the vendee until his right is declared by a decree of Court. *Mokshagunam Subramania v. S. V. Ramkrishna*, 70 Ind. Cas. 357.

Clause (1).—*Realise his security* means to put the property to sale and to appropriate the sale proceeds towards the payment of his principal with interest and costs, *Jugal Kishore v. Bankim Chandra*, 17

A. L. J. 480: 51 Ind. Cas. 192. If a balance is left unrealised he may prove for the balance as an unsecured creditor and is entitled to rateable distribution. When the mortgage decree directs that if the mortgage debt be not satisfied by the sale of the mortgaged property, the balance be realised from the person and property of the mortgagor, on the adjudication of the mortgagor, the mortgagee is entitled to have his name entered in the schedule of creditors not as a secured creditor but as an unsecured creditor for the balance of the amount then due. *Baranashi Koer v. Bhabadev Chatterji*, 34 C. L. J. 167. A decree under Or. XXXIV, r. 6 C. P. C. does not create a debt but merely authorises the decree-holder to realise it by means of execution in the ordinary way. The absence of such a decree therefore does not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purpose of insolvency proceedings is to prove the existence of the debt. Under Sec. 47 a secured creditor who realises his security may prove for the balance due to him after deducting the net amount realised. The fact that he had got his name removed from the list of scheduled creditors and had proceeded to realise his security will not debar him of his statutory right to prove for the balance due to him in insolvency proceedings. *Habulal Sahu v. Krishnaprasad*, 85 Ind. Cas. 543.

Clause (2).—The general rule in bankruptcy that, when a creditor seeks to prove against his debtor's estate he must give up or value any security, which if not retained by him, would go to augment that estate, presupposes that the security is for the particular debt for which he seeks to prove and does not apply to a case where the security is for a different debt. *Ex parte Manchester & Liverpool District Banking Co. Ltd.*, (1924) 2 Ch. D. 199.

Relinquishes means where the creditor does not elect to enforce his claim independently of the insolvency proceedings by sale of the security. The relinquishment or surrender of a security by the creditor enures for the benefit of the creditors generally, not for the benefit of the second mortgagee, *Crackwell v. Janson*, 6 Ch. D. 745. There is no obligation on a secured creditor to give up the security before proving his claim and he might prove for the whole amount of the debt and retain the security, *In the matter of Shib Chunder Mullick*, 8 B. L. R. 30.

Clause (3).—Under this sub-section a secured creditor who neither elects to realise nor surrender his security is not allowed to have his debts entered in the schedule unless he values his security and deducts

the said value from the total amount due under the security to him. Then only he is entitled to a dividend in respect of the total balance.

Clause (5).—It is expedient in the interest of all the creditors that the Court should be allowed to bring the insolvent's mortgaged property to sale and give the mortgagee the same remedy against the sale proceeds as he had against the property, itself, *Gopinath v. Guruprasad*, 15 Ind. Cas. 860.

Only the property of the insolvent vests in the Official Receiver. The Act does not empower the latter to sell the former's estate free from encumbrances even with the consent of the mortgagee. Such a consent could not be implied merely from the absence of a reply by the mortgagee to a letter of the Official Receiver stating that he would sell the property free from mortgage in case he did not reply. Held also that an unsuccessful attempt of the mortgagee in the Insolvency jurisdiction to get cancelled the sale held by the Official Receiver free from incumbrance did not estop the mortgagee from thereafter filing a suit to enforce his mortgage. *Kanneappa Mudaly v. Raju Chettiar*, 47 Mad. 605; 47 M. L. J. 16; 79 Ind. Cas. 850; 1924 A. I. R. (M). 761.

Clause (5).—If the secured creditor realise an amount over and above what is actually due to him the surplus must be paid over to the Receiver, *Ex parte King*, 20 Eq. 273.

Clause (6).—The provisions of this section must be strictly complied with before a secured creditor is entitled to a dividend under the insolvency proceedings, *Gopinath v. Guruprasad*, 15 Ind. Cas. 860.

48. [32] (1) On any debt or sum certain whereon interest is not reserved or agreed for, and which is overdue when the debtor is adjudged an insolvent, and which is provable under this Act, the creditor may prove for interest at a rate not exceeding six per centum per annum—

(a) if the debt or sum is payable by virtue of a written instrument at a certain time from the time when such debt or sum was payable to the date of such adjudication; or

(b) if the debt or sum is payable otherwise, from the time when a demand in writ-

ing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment to the date of such adjudication.

(2) Where a debt which has been proved under this Act includes interest or any pecuniary consideration in lieu of interest, the interest or consideration shall, for the purposes of dividend be calculated at a rate not exceeding six per centum per annum, without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.

NOTES.

Review.—This is section 32 of Act III of 1907, corresponding to sec. 23 of the Bankruptcy Act, 1883.

Rate of Interest.—It must be remembered even in the contingency of their being a surplus the Insolvent Court deals with the claim for payment of interest as a Court of Equity and according to rules of equitable computation for deferred payment, but not according to the letter of the original contract which is stopped at the date of the vesting order, *Subbrayalu v. Rowlandson*, 14 Mad. 134 “Where an insolvent's estate is sufficient to pay off the creditors in full leaving a balance in the hands of the Official Assignee the Court will direct interest at 6 per cent. to be paid on such proved or contract debts as expressly or impliedly carry interest as from the date of the filing of the insolvency petition, and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands to be paid over to the insolvent,” *In Re. Mahamed Shah*, 13 Cal. 66. An insolvent's solvent debtors are not absolved from the liability to pay interest on the ground that the insolvent has filed his petition in insolvency. The interest when collected is distributed among the creditors, *Firm of Kanhya Lal Mohan Lal of Amritsar v. Seth Radha Kissen*, 112 P. L. R. 1913: 92 P. W. R. 1913: 18 Ind. Cas. 205.

“**Damdupat.**”—The rule of damdupat only exists so long as the relation of debtor and creditor exists but not when the contractual

relation has come to an end by decree, and it was held that the rule of *domdupat* was not applicable to the claim of a creditor when that claim was admitted in pursuance of an order made in insolvency proceedings, because the order amounted to a decree, *In the matter of Hari Lal Mullick*, 33 Cal. 1269: 10 C. W. N. 884.

General Rules—"The general rule in bankruptcy is that the interest ceases at the date of the bankruptcy and there shall be no proof of interest subsequent to that date. James L. J. refers to that rule as well established in *Re. Savin* L. R. 7 Ch. App. 760, and held even a secured creditor who sought to prove for a claim for deficiency was bound to apply the sale proceeds of his security in payment of principal and interest up to the date of bankruptcy and up to that date only. There is hardly any room for doubt that the same rule is applicable to India. It must be remembered that the rule must be applied subject to the limitations mentioned by Cotton L. J., viz., that there can be no proof in bankruptcy for interest accruing due after the filing of the petition unless the estate is more than sufficient to pay the creditors in full, *Esparle Bath, Re. Philipps*, 1882, L. R. 22 Ch. D. 450. The principle on which the general rule rests is stated by James L. J. in *Re. Savin*, *supra*, in these terms: "the theory in bankruptcy is to stop all things at the date of bankruptcy and to divide the wreck of the man's property as it stood at that time. Directly the insolvent files his petition and a vesting order is made he is divested of all his property and he ceases to be *Sui juris* for the purpose of satisfying his obligations and the Insolvency Court intervenes as a Court of Equity to do equal justice to all his creditors by enforcing an equitable distribution of his property in discharge of his obligations as they stood at the date of the petition and the vesting order. I take the general rule then to rest on this foundation viz. that the contracts of the insolvent stop at the date of the vesting order as a matter of legal right and the Insolvent Court becomes seised of jurisdiction to deal with his property towards their satisfaction through the Receiver as a Court of Equity and according to equitable rules of distribution," *Subbryalu v. Rawlandson*, 14 Mad. 134. **Exception.** The exception to the rule mentioned above presupposes that there is a surplus left after all the debts as they stood at the date of the petition are satisfied, and rests on the basis that when such is the case a claim for subsequent interest may be permitted to be proved, *Ibid.*

49. [25] (1) A debt may be proved under this Mode of proof. Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt.

(2) The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers.

NOTES.

Review.—This is section 25 of Act III of 1907 and is based on Rules 2 and 3 of Schedule II of the Bankruptcy Act, 1883.

A proof of a debt may be made by the creditor by delivering or sending in a pre-paid letter to the Official Receiver an Affidavit verifying his debt. The affidavit may be made by the creditor himself or by some person authorised by him or on his behalf. If made by a person so authorised it must state his authority and means of knowledge.—*See Bankruptcy Act, 1883, Sch. II, r. 2 and 3.*

“**By Post.**”—“The English practice of proving by transmission of an affidavit is obviously desirable and its introduction is safeguarded by the provision of section 25.”—*Viceregal Council Proceedings to Act III of 1907.*

Under sec. 352 of the C. P. C. 1882, a creditor by omitting to come in and prove his debts would not be debarred from executing his decree after the order of discharge. *Harapriya v. Shama Charan*, 16 Cal. 594. “Under the present Act the suit is barred,” *Irshad Hussain v. Gopi Nath*, 17 A. L. J. 374: 49 Ind. Cas. 590.

The mode of proof by affidavit relates not only to the debts for which no decrees have been obtained but also in the case of debts for which decrees have been obtained a copy of which should be filed along with the affidavit. A creditor who lodges his proof in the statutory form is entitled that it should be dealt with without doing anything more. *Re Archibald Gilchrist Peace*, 26 C. W. N. 653.

50. [26] (1) Where the receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the Disallowance and re-
duction of entries in
schedule.

receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt.

(2) The Court may also, after like inquiry, expunge an entry or reduce the amount of a debt upon the application of a creditor where no receiver has been appointed, or where the receiver declines to interfere in the matter or, in the case of a composition or scheme, upon the application of the debtor.

NOTES.

Review.—This is section 26 of Act III of 1907, and corresponds to Rules 23 and 24 to Sch. II of the Bankruptcy Act, 1883.

“Under this section Courts have been invested with the powers of expunging or reducing proofs which is exercised by the Courts in England.” *Statement of Objects and Reasons to Act III of 1907.*

“If a trustee thinks that a proof has been improperly admitted the Court may on the application of the trustee after notice to the creditor who made the proof expunge the proof or reduce the amount.”

Rule 23. “If a creditor is dissatisfied with the decision of a trustee in respect of a proof the Court may on the application of a creditor reverse or vary the decision,” *Rule 24.* “The Court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or in the case of a composition or scheme upon the application of the debtor.” *Rule 25.*

Procedure.—In India the machinery provided for performing the functions of the Official Receiver in framing the schedule is the Court and those of the trustee in adding, altering or expunging the proof is the Receiver, *Beharilal v. Harsukhdas*, 25 C. W. N. 137: 61 Ind. Cas. 904. In *Khadi Shah v. Official Receiver, Tinnevely*, 41 Mad. 30, it has been held, “the Official Receiver in framing a schedule of creditors does not decide judicially or finally upon contested claims and his framing a schedule did not prevent the Court from entertaining an application by the Receiver under Ss. 26 and 36 of Act III of 1907, now Ss. 50 and 53, to expunge the names of the creditors from the schedule.” A creditor of the estate of an insolvent put in an ap-

plication under Sec. 26, now 50, to expunge certain entries of debts purported to be owing to some other creditors. The District Judge called upon the latter to prove their debts. They filed affidavits in support of their claims. The District Judge then asked the Receiver, *who was not an Official Receiver*, to take any evidence the creditors might adduce. *Held*, the procedure in delegating the taking of evidence to the Receiver was not proper, and the order should be set aside. *Held*, also, that the deposition of the insolvent in public examination under Sec. 14, now 24, is not relevant evidence in an enquiry under Sec. 26, now 50, *Satrasala Hanumanthu v. Talisetti Subbayyar*, 1921 M. W. N. 109: 61 Ind. Cas. 767. "The Court has no power to expunge the name of a creditor where no fraud is proved or alleged in regard to his claim." *In Re. Dewcurn Jewraj*, 12 Bom. 342.

Appeal.—An appeal lies against an order disallowing or reducing entries in the schedule under Sec. 75 (2), Schedule I, *infra*.

Effect of insolvency on antecedent transactions.

51. [34] (1) Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of *the admission of the petition*.

(2) Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed.

(3) A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

NOTES.

Review.—This is section 34 of Act III of 1907 with the substitution of the clause 'date of the admission of the petition' in place of the 'date of the order of adjudication' in sub-section (1). This amendment is best explained in the *Report of the Select Committee*, dated 24-9-19: "This clause proposed to bring section 34 of Act III of

1907 into line with section 53 of the Presidency Towns Insolvency Act III of 1909. It has evoked considerable criticism particularly with reference to the difficulty of proving whether a creditor had notice of the proceedings or not. We therefore propose to restrict the rights of creditors to assets realised before the date of the admission of the petition."

Rights of the Executing Court.—There is no provision in the Provincial Insolvency Act which prohibits a Court executing a decree from selling the judgment-debtor's property by reason of its having been given notice that an insolvency petition by him had been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by Sec. 52 of the Act to direct the property, if in its possession, to be delivered to the Receiver. In the absence of such an application the Court is at liberty to sell the property and the sale being legal cannot be impeached by the Receiver or the creditor. *Rolla Ram v. Ram Labhya Mal*, 80 Ind. Cas. 509; 6 L. L. J. 232.

The date of the admission of the petition.—Under Sec. 16 (6) of Act III of 1907 corresponding to Sec. 28 (7) of the present Act an order of adjudication relates back to and takes effect from the date of the presentation of the petition on which it was made. It was argued in *Rakhal Chundra Purkait v. Sudhindra Nath Bose*, 46 Cal. 991; 24 C. W. N. 182 that no transfer or alienation by the insolvent can be declared void against the Receiver under Sec. 36 of Act III of 1907 now Sec. 53 unless the transferor was adjudged insolvent within 2 years from the date of the transfer although the presentation of the application might have taken place within 2 years from the date of the transfer, and that if it was the intention of the Legislature to annul only those transfers which come within 2 years from the date of the presentation of the application the Legislature would have used the expression "from the date of the presentation of the application" as they have done in Sec. 37 now Sec. 54. *Held*, that "an order of adjudication relates back to and takes effect from the date of the presentation of the petition for the purpose of making the property of the insolvent liable to the claims of the creditors." Though the High Court did not accept the argument as correct still it can not be maintained that the section can not bear that interpretation. To avoid that criticism and to make the intention of the Legislature quite clear "the date of the admission of the petition" has been substituted in

the place of "the date of the order of adjudication." See also *Acham-bit Lal v. Chhanga Mal*, 32 Ind. Cas. 429.

Principle.—The principle that one creditor shall not take part of the fund which would otherwise have been available for payment of all the creditors and at the same time be allowed to come in *pari passu* with creditors for satisfaction out of the remainder of that fund does not apply when that creditor obtained by his diligence something which did not and could not form part of that fund, *R. H. Cockerell & ors. v. Theodore Dickens*, 2 M. I. A. 353. Under Sec. 34 an execution creditor is entitled to the assets realised in the course of execution by sale or otherwise before the date of the adjudication order, *Gour Charan, Ganga Charan Shah v. Toyebuddin Ahmed*, 23 C. W. N. 461. The policy and the object of the statute is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active. *Bower v. Hett*, (1895) 2 B. B. 51.

Assets realised in execution or otherwise.—Assets means all a man's property, of whatever kind, which may be used to satisfy debts or demands existing against him, and it is said to be realised when by some process it is reduced into possession, that is to say, in a form in which it is available for immediate application towards the satisfaction of the decree which is being executed, *Sarabji v. Gobindramji*, 16 Bom. 91. It also means the sale proceeds of the property sold in execution of a decree, *Ramanatham v. Subramaniya*, 26 Mad. 179. Rents realised by Receiver are assets realised, *Fink v. Maharaja Bahadur*, 26 Cal. 772.

'Assets' includes any assets held by the Court irrespective of the manner in which they came into the possession of the Court and hence money brought voluntarily into Court is an asset, *Hari Charan v. Birendra Nath*, 35 C. L. J. 327.

See also case-law under Sec. 73, C. P. O.

"Realised."—Where a debt due to a debtor by a third party is paid into Court such payment amounts to realisation, *Srinivasa v. Sitaram*, 19 Mad. 72; 5 M. L. J. 151. Where property of a debtor is put to sale in Court auction, assets are said to be realised only when the entire purchase money is paid into Court by the auction-purchaser, *Hafez v. Damodar*, 18 Cal. 242. Assets cannot be said to be held by the Court available for rateable distribution until the whole of the

purchase money has been deposited, *Maharajah of Burdwan v. Apurva Krishna Rai*, 15 C. W. N. 172. In the case of movables the assets are said to be realised only on receipt of the entire purchase money by an auctioneer from the purchaser in execution of sale, *J. C. Gaulstoun v. Umesh Chandra Banerji*, 25 C. L. J. 303. See also case-law under Sec. 73, C. P. C.

The words "before the date of the admission of the petition" qualify the words "assets realised." They do not qualify the word "sale," and the assets can be said to be "realised in execution" only on the date on which the balance of the purchase money is deposited. They cannot be said to be realised in execution on the date when the deposit of twenty-five per cent. of the sale proceeds is made by the auction purchaser on the date of sale, but if before the balance of the purchase money is deposited, an application for adjudication of the judgment-debtor is entertained the decree-holder is not entitled to sale proceeds including even the twenty-five per cent. deposited to the exclusion of the judgment-debtor's other creditors as against the receiver.

Rateable Distribution.—Where an order for rateable distribution has been passed under Sec. 73 C. P. C. the exception to Sec. 51 (1) applies not only to the amount credited in favour of the attaching decree-holder but also to the amount rateably distributed under the order. Where an order for rateable distribution was made but the decree-holders were prevented from drawing out the sums to which they were entitled thereunder by reason of litigation instituted by other creditors of the judgment-debtor and before the sums were actually drawn out, the judgment-debtor became insolvent, held, that the sums in Court must be treated as the property of the decree-holder and not that of the judgment-debtor. As soon as the order for rateable distribution was passed the Receiver cannot recover them from Court. *The Official Receiver, Tanjore v. Venkatarama Iyer*, 42 M. L. J. 362: 1922 M. W. N. 51.

Conflicting Decisions.—Where defendant's properties were attached before judgment in the plaintiff's suit by the Court which directed the attached properties to be released from attachment on the defendant's paying Rs. 500/- as security and after the same was paid and the properties released the defendant was adjudicated an insolvent under Act III of 1907 but not before the plaintiff's suit was decreed, held, the plaintiff acquired no charge or lien upon the money deposited as security for getting the attachment before judgment withdrawn and

* the Receiver in insolvency was entitled to have the money paid to him. The money not having been realised in execution of a decree prior to the adjudication order, sec. 34 of Act III of 1907 did not apply, *Pramatha Nath v. Mohini Mohan*, 19 C. W. N. 1200, *Purshotom Das v. David*, 13 A. L. J. 898, *Kashi Nath v. Kanhya Lal*, 37 All. 452, *II. W. Farmers v. Cowasji*, 14 A. L. J. 236: 33 Ind. Cas. 723. Where the assets have been realised in the course of execution by sale or otherwise as mentioned in sec. 34 of Act III of 1907, before the date of the order of adjudication, an execution creditor is entitled to the benefit of the execution against the Receiver, *Gour Charan Ganga Shah v. Toyabuddin Ahmed*, 23 C. W. N. 461.

" Clause (1) of sec. 34, now 51 restricts the operation of sec. 16 (6), now 28 (7). A creditor who had attached a sum of money due to the insolvent before his estate vested in the receiver appointed after the adjudication order is entitled to apply it exclusively in satisfaction of the debt though an interim receiver was appointed," *Madhu Sagar v. Ksihtish Chandra*, 42 Cal. 189. " Section 34 controls sec. 16 of the Provincial Insolvency Act which directs that the title of the Receiver relates back to the date of the presentation of the insolvency petition. The title of the decree-holder in respect of assets realised before the order of adjudication prevails over the title of the Receiver appointed on or after such date. The order of adjudication relates back to the date of the presentation but this does not apply to the assets in the course of execution before the order of adjudication." *Paul Ram v. Sheonath Pershad*, 2 P. L. J. 235. In order that money attached in execution of a decree may be realised within the meaning of sec. 34 it must reach the Court which passed the decree and not when the Treasury Officer retained it for transmission to the Court, *Debi Pershad v. O. M. Cheine*, 16 Ind. Cas. 84: 9 A. L. J. 797. In *Din Doyal v. Gursaran Lal*, 42 All. 336: 18 A. L. J. 287: 59 Ind. Cas. 67, it was held that sec. 16 (6) of the old Act, now sec. 28 (7), does not control sec. 34 (1). But when property of the applicant in insolvency is sold in execution between the date of the application and of the order of adjudication the property sold vests in the auction purchaser and not in the Receiver, following *Srichand v. Murarilal*, 34 All. 628, *Basarmal v. Khemchand*, 11 Ind. Cas. 433 approved. In *Muhammad Sariff v. Radhamohan*, 57 Ind. Cas. 760, held that under Sec. 34 (1) of Act III of 1907 the Receiver was not entitled to any sums realised prior to the adjudication and that on the transferee of the attached decree accounting for sums realised subsequent to that order his proof

in respect of the amount unrealised under the decree should be admitted.

Present Law.—To set at rest this conflict of decisions in the different High Courts on the interpretation of the clause ‘*before the date of the order of adjudication*’ the clause ‘*the date of the admission of the petition*’ has been substituted.

Sub-section (3).—Where a purchase of an insolvent’s property in execution sale has been for valuable consideration without notice, the purchaser from such a purchaser even with notice of the insolvency acquires the right of the vendor and gets a good title under sec. 34 (3) as against the Receiver, *Madhu Sudhan v. Parbati Sundari*, 35 Ind. Cas 643.

52 [35] Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that *an insolvency petition by or against the debtor has been admitted*, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver, but the costs of *the suit in which the decree was made and* of the execution shall be a first charge on the property so delivered and the receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge.

NOTES.

Review.—This is section 35 of Act III of 1907, and is based on sec. 11 (1) of the Bankruptcy Act, 1890. The clause ‘an insolvency petition by or against the debtor has been admitted, has been substituted in place of ‘an order has been made against the debtors’ and the clause ‘the costs of the suit in which decree was made’ has been newly added. These amendments are thus explained in the Select Committee Report, dated 24th September 1919. “We provide at the same time by a new clause amending sec. 35 of the Act that the costs of the suit as well as of the execution shall be a first charge on property delivered by the Court under the section to the Receiver.”

Object of the section.—The object of the section is to stay the execution proceedings in all the courts against the estate of the insol-

vent by operation of law as soon as an application for insolvency has been admitted, to prevent individual creditors deriving unfair advantage over other creditors and to place the property in the hands of the receiver for equal distribution to the general body of creditors. The difference between Ss. 34 and 35, now Ss. 51 & 52, is that if the creditor has been able to realise the whole or part of his dues by due diligence before a receiving order is made he will be allowed to reap the benefit of his diligence (S. 51), otherwise all creditors are equally entitled to participate (S. 52) and to achieve this object all Courts have been directed to stay all execution proceedings as soon as it is informed that a petition for insolvency by or against the judgment-debtor has been admitted. After an adjudication in insolvency an attachment of property though made before adjudication ceases to have any effect and the property vests in the Receiver, and if no Receiver is appointed the property vests in the Court, *Gobind Das v. Karamji*, 40 All. 197.

One A. was adjudged insolvent on the 17th Aug. 1911. In execution of a decree against him on the 21st Jan. 1911, certain properties were attached. The Receiver of the insolvent's estate applied to the Court on the 2nd March 1912 to stay the sale on the ground that A. had been declared insolvent. But the sale nevertheless took place and the property was purchased by the second respondent. The Receiver thereafter applied to the Court for setting aside the sale. Held under sec. 47 C. P. C. the sale was altogether irregular and the Court in holding the sale after it has been brought to its notice that the judgment debtor had been adjudged an insolvent, acted, if not without jurisdiction, at any rate, with material irregularity in the exercise of its jurisdiction. Held further, that the second respondent acquired no title to the property as the judgment-debtor had at the time of the sale no right, title or interest which could be sold and that neither sec. 34 nor sec. 35 (now 51 and 52) of the Provincial Insolvency Act affected the case, *Anant Ram v. Vetalh*, 34 Ind. Cas. 829.

Notice.—If notice as required by the section is not served on the Court the Court can proceed with the execution of the decree and a Receiver cannot afterwards impugn the sale, *Walford's Estate Trustee v. Levy*, (1892) 1 B. B. 772. The Receiver is to give notice of the admission of the insolvency petition to the executing Court and may request the executing Court to deliver up the property seized in execution. There is no provision in the Provincial Insolvency Act which pro-

hibits a Court executing a decree from selling the judgment-debtor's property merely by reason of its having been given notice that an insolvency petition by him has been admitted. It is only when an application is made to the executing Court for the delivery of the property that the Court is required by Sec. 52 to direct the property, if in its possession, to be delivered to the Receiver. If no such application is made the executing Court is at liberty to sell the property and the sale being legal cannot be impeached by the Receiver or the creditors. *Rolla Ram v. Ram Labhya Mal*, 6 L. L. J. 232: 85 I. C. 509.

Property.—Sec. 52 refers to property which would include both movable and immovable property of the debtor. It contemplates the delivery of the property in the possession of the Court and thereby restricts its operation to such *movable property which is seized by attachment or in such other manner as to give its possession to the Court*. Debts due to the debtor which are attached by the issue of prohibitory order under Or. XXI r. 46 (1) a, C. P. Code, do not fall within the purview of the section. *Lyon Lord & Co. v. Virbhandas*, 76 Ind. Cas. 380: 1924 A. I. R. (s.) 69,

Receiver.—The Receiver referred to in Sec. 52 is the Receiver appointed under paragraph (1) of Sec. 56 of the Act after the passing of the order of adjudication and not an *interim* Receiver appointed under Sec. 20 of the Act. The power to apply for an order under Sec. 52 for transfer of property from the custody of the Court to that of the Receiver or the power to sell a part of the property to pay off a charge created by Sec. 52 cannot be conferred on an *interim* Receiver for the preservation and management of the property pending decision of the Court *Lyon Lord & Co. v. Virbhandas. Supra.*

Stay of Proceedings.—When property under attachment is not liable to speedy decay or where it is not of such a nature that the delay in its sale would seriously depreciate its value, the Court should in the exercise of its inherent jurisdiction order stay of execution proceedings till such time as the Insolvency Court either passes an order of adjudication or dismisses the application for adjudication. *Lyon Lord & Co. v. Virbhandas, supra.*

53. [36] Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser

Avoidance of voluntary transfer.

or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be *voidable* as against the receiver and may be annulled by the Court.

NOTES.

Review.—This is section 36 of Act III of 1907 corresponding to sec. 47 of the Bankruptcy Act, 1883. The only amendment is the substitution of the word 'voidable' in place of 'void' as it was before. Under this section transfers of property made before and in consideration of marriage and also transfers made in favour of a purchaser or incumbrancer in good faith and for valuable consideration are not affected and cannot be annulled. Therefore transfers not made before and in consideration of marriage and not made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, if the transferor is adjudged insolvent within two years after the date of transfer, shall be void as against the Receiver and shall be annulled by the Court.

Jurisdiction of the Court.—A Court exercising insolvency jurisdiction under Act V of 1920 has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act. But it also has to decide all questions of general law including such questions as are raised by Sec. 53 of the T. P. Act. *Shikri Prasad v. Aziz Ali*, 44 All. 71. Under Section 36, now 53, the Court has jurisdiction to deal with alienations made by the debtor of properties situated outside its local limits and such provision is not affected by the provision of Sec. 16 of C. P. C. *Lalji Sahay v. Abdul Gani*, 15 C. W. N. 253; 12 C. L. J. 452. In *Draupadi Bai v. Gorind Singh*, 65 Ind. Cas. 334, the question arose, has the Court power to annul the transfer and divest the transferee of properties situated in a foreign territory? It was held "it seems that the Legislature cannot have intended to give the Court any such power. The Court of the foreign territory would not recognise the annulment of a transfer of immovable property situated therein and validly effected according to the form required by its own law."

After an adjudication order the Insolvency Court is the only Court competent to set aside the transfer. *Mirappa v. Raman Chettier*, 42 Mad. 322; 10 M. L. W. 59; 52 Ind. Cas. 519.

In *Dronadula Sriramulu v. Ponakavira*, 45 M. L. J. 105: 1923. M. W. N. 306: 72 Ind. Cas. 805: 1923 A. I. R. 641 (M.), it was argued that Sections 36 and 37, now 53 and 54, confer a limited jurisdiction upon the Insolvency Courts and that to hold that the Court possesses the power to set aside a deed of mortgage executed by the insolvent four years previous to the date of adjudication will be inconsistent with the assumption involved in the said sections. It was held that "these two sections enact special rules of substantive law to be followed by the Courts in the exercise of insolvency jurisdiction. The law enunciated in the said sections is not a part of the general law, and is to be applied only in cases which come up before the tribunals exercising powers conferred by the Insolvency Act. A comparison of the terms of Sec. 53 T. P. Act with the terms of Sec. 36, now 53 of the Insolvency Act will make the point clear. A settlement made by a person whose solvency is beyond question, but who, owing to unforeseen circumstances, becomes an insolvent within the date of the settlement, cannot be set aside under the general rule, viz., Sec. 53 of the T. P. Act, but can be annulled under this section 53 of the Provincial Insolvency Act.....Sections 53 & 54 of the Insolvency Act don't really deal with the jurisdiction of the Insolvency Courts but rather lay down rules of evidence. Where a Court on being satisfied on enquiry as to the truth of a creditor's petition that a debtor had committed an act of insolvency in that he alienated his properties with intent to defeat his creditors, not only adjudicated the debtor an insolvent but also annulled the alienation by the same order before appointing a Receiver, held, that the order of annulling the alienation was illegal, that it was for the Receiver to apply for such an order, and that until the Receiver refuses to do so, no one else has the right to apply. *Hemraj Champalal v. Ramkishan Ram*, (1916) 2 Pat. L. J. 101, followed in *Appi Reddi v. Appi Reddi*, 45 Mad. 189.

Delegation of Jurisdiction.—It is clearly undesirable that, where a matter has to be decided on trial, the Court should not hold the trial itself and retain the advantage of seeing the witnesses give evidence following the course of the proceedings; and it is further undesirable that it should delegate its duty to a person, such as the Official Receiver, whose interest and duty may conflict in the conduct of the proceedings. But at the same time, the principle laid down in *Jainab Bibi v. Hyder Ally*, 43 Mad. 609, applies, viz., that if by the consent of parties the enquiry is held by the Official Receiver their consent was

sufficient to validate the procedure employed. *Krishna Iyer v. Official Receiver, Trichinopoly*, 1925 A. I. R. (Mad.) 381.

Presumption.—"Wherever a voluntary transfer or preference of a creditor on the one hand, and adjudication of a transferor or the debtor on the other hand, are brought into contiguity, the law peremptorily requires a certain inference to be made, enquiry is altogether excluded, and the inference will not be allowed to be displaced by any contrary proof, however strong. The Insolvency Courts shall presume that the transfer was made or preference shown by the insolvent with the intent to defeat his creditors. The presumption to be made is absolute or irrebuttable like the presumption contained in Sec. 112 of the Evidence Act." *Per Venkatasubba Rao J. in Dronadula Srimulu v. Ponakavira*, 45 M. L. J. 105: 1923 M. W. N. 306. Under Sec. 53 every transaction which an insolvent enters into within two years previous to his insolvency is treated as *prima facie* invalid and the burden is on the insolvent or the alienee to show that the transaction impeached is a valid and a *bona fide* one. *Official Receiver, Tanjore v. Vidappa Mudaliar*, 47 M. L. J. 431: 1924 M. H. N. 506: 1924 A. I. R. (M.) 865.

Conditions for annulment.—The provisions applicable to the case of a transfer by an insolvent in favour of a person *other than* a creditor are contained in Sec. 53. *Iswar Das v. Ladha Ram*, 62 Ind. Cas. 924. In order that a transfer may be annulled under the provisions of this section the following conditions are required to be fulfilled: (1) that the transfer is not made before and in consideration of marriage, (2) that the transfer is not made to a purchaser or incumbrancer in good faith and for valuable consideration, (3) that the transferor has been adjudged insolvent within 2 years from the date of the transfer.

Transfers made before and in consideration of marriage are protected. But where there is evidence of an intent in the minds of both the parties to the marriage to defeat and delay creditors and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the transfer will be void, *Bulmer v. Hunter*, 1869, L. R. 8 Eq. 46. But it will be otherwise if the wife be innocent of the fraud, *Re Crawford*, 1887, 6 Ch. D. 29. An antenuptial settlement cannot be set aside unless it can be shown that not only was fraud intended by the husband when he executed the settlement but also that the circumstances are such that the court is justified in coming to the conclusion that husband and wife are jointly parties to the fraud. *Ramsay v. Calvert*, 15 C. W. N. 290 n.

Gift to wife.—A husband transferred his share in his family dwelling house to his wife without consideration and the husband was adjudicated within 3 months from the date of the transfer. The wife transferred the property. Held, that even assuming that the transferee had purchased the property for valuable consideration and without notice of the adjudication of the insolvent the transfer to the purchaser by the wife subsequent to adjudication was void as the transfer by the husband to the wife prior to the insolvency was found to be fictitious and *benami*, *Lakhipriya v. Rai Kissori*, 20 C. W. N. 554. A wife is entitled to establish her title to the property transferred for valuable consideration to her by her husband more than a year before he was adjudicated insolvent. Transfers of this kind, if they don't fall under Sec. 53 of the T. P. Act, would in the absence of any provision to the contrary be valid transfers, *Mariappa Pillai v. Raman Chettiar*, 42 Mad. 322: 10 M. L. W. 59: 52 Ind. Cas. 519, where a deed of gift of immoveable property in favour of wife was secretly executed at a time when the failure of the firm of which the donor (husband) was a partner was in sight, if not actually imminent, and the matter was kept secret till the firm had been declared insolvent and the lady never obtained possession of the properties and no convincing explanation was attempted to justify the transaction, held, that the title did not pass from the donor to the donee, *Official Assignee v. Bidya Soonderi*, 30 C. L. J. 428.

A transfer by an insolvent of a portion of his property within 2 years prior to his insolvency to his wife, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration is void as against the Receiver and the property comprised in the transfer is liable to be distributed among the general body of creditors, *Bhut Nath v. Biraj Mohini*, 28 C. L. J. 536: 49 Ind. Cas. 87.

Good faith.—A purchase for value not made in good faith, i.e., where the purchaser is privy to the intention to defeat creditors is void under the Bankruptcy Act, *Re Maddever*, 1884, 27 Ch. D. 523. There is a suspicion of fraud where an insolvent executes a deed of gift only four days before filing his application for adjudication whatever the declaration in the deed of gift may be. *Husaini v. Muhammad Zamir Abedi*, 74 Ind. Cas. 802. "Where a mortgage by an insolvent made in favour of a creditor for a substantial cash consideration contemporaneous with the mortgage is impeached under

sec. 36 the real test of the *bona fides* is as follows: Did the lender intend that the advance should enable his debtor to carry on his business and had he a reasonable ground for believing that it would enable him to do so? If that was the intention of the mortgagee the transaction is unimpeachable. But if the mortgagee knew that the mortgagor would not be enabled to carry on his business, if the mortgage was merely a device for defeating creditors, the transaction was not *bona fide*," *F. F. Campbell & Co. v. Mithomal Dwarkadas*, 9 S. L. R. 65. Where an insolvent executes a sale deed in favour of his relation in order to defraud his creditors and retains possession of his property sold, an intent to defraud creditors, should be imputed to the vendees also. A sale made with intent to defraud creditors is wholly void even when there has been a part payment of the consideration. *Palaniappa v. Official Receiver, Trichinopoly*, 25 Ind. Cas. 948. Where an insolvent transfers property and the question is whether in so doing he acted in *good faith* the fact that there has been valuable consideration for the transfer adequate to the occasion, would negative the inference that there was absence of good faith inspite of the fact that the transfer was in favour of a relation. *J. M. Lucas v. Official Assignee, Bengal*, 24 C. W. N. 418: The mere fact that a purchase of property which has the effect of defrauding or delaying the vendor's creditors was for good consideration is not enough to protect the purchaser. It must also be shown that he acted in *good faith*. But the mere fact of the indebtedness of the vendor or knowledge on the part of the purchaser that the sale may defeat or delay creditors is not sufficient to negative the *bona fides* of the purchaser. If there was good consideration and the intention to part with the whole interest is proved *and it is not shown that the transfer was a mere cloak for retaining a benefit to the vendor it is valid against the creditors*. But if the object of the transferor is to defeat or delay his creditors and that object is known to the transferee and he aids and assists in its execution then the transfer is not in good faith, *Kamini Kumar v. Hirral*, 23 C. W. N. 769. Within 3 months prior to the presentation of a petition in insolvency the insolvent nominally sold a property in favour of a person with the direction to discharge a mortgage of the property. The adjudication which followed was annulled by the District Court on a composition but was restored on appeal. Pending the appeal a near relation of the insolvent, who was aware of the proceedings, purchased the property from the original vendee and paid up the mort-

gagae. *Held*, that the purchase was not made in good faith and for valuable consideration and was voidable under sec. 53. *Kalluri Venkataraman v. Official Receiver*, 18 L. W. 610: 1923 M. W. N, 780: 76 Ind. Cas. 1006: 1924 A. I. R. (M), 358, .

Good Faith—on whose part? Is it the good faith of the transferor or the transferee that is required to be established in order to protect a transaction as *bona fide* under this section? There is no reason for holding that the words “in good faith and for valuable consideration” qualify the word “made” and not the words ‘a purchaser or incumbrancer.’ Both under the English Law and the Indian Law transactions can be upheld by any person making title in good faith, i.e., without notice or without the power of obtaining knowledge of any fraud or fraudulent intention on the part of the bankrupt, *Butcher v. Stead* (1875) L. R. 7 H. L. 839. Lord Hatherley observed, “I think the legislature intended to say that if you, the debtor, for the purpose of evading the operation of the Bankruptcy Law and in order to give fraudulent preference, make this payment or discharge, it shall be wholly done away with *except in cases where the person you have favoured is wholly ignorant of your intention to favour him.*” In *Gopal v. Bank of Madras*, 16 Mad. 397, it has been held that mere fraudulent intent of the vendor cannot avoid the deed if the purchaser were free from that fraud. Cf. *In Re. Johnson: Golder v. Gillam*, L. R. 20 Ch. D. 389; *Motilal v. Utamjagjivandas*, 13 Bom. 434. Where sales are effected between persons who are related to each other in order to defraud creditors, it necessarily follows that the vendee no less than the vendor was actuated by motive to defraud creditor and that renders the sale wholly void, *Chidambaram Chettiar v. Sami Aiyar*, 30 Mad. 6.

Valuable Consideration.—On the authority of *Sharf-uz-Zaman v. Sir Henry Stangon*, 70 Ind. Cas. 253: 25 O. C. 291: 1923 A. I. R. (O) 80, in which it was held that the trustees were not transferees for consideration, it was argued in *Chowdhury Sharf-uz-Zaman v. Deputy Commissioner, Burabanki*, 79 Ind. Cas. 888, that the deed of trust executed by the insolvent within two years from the date of his adjudication was void. The appellate Court in appeal held that “Sec. 53, and subsequent section 55 which is inserted for the protection of *bona fide* transactions’ are both copied almost verbatim from the English Bankruptcy Act. It is therefore natural to assume that the words ‘purchaser’ and ‘incumbrancer in good faith’ which are

taken direct from that Act have the same meaning as they have in English Courts. It has been ruled in *Hance v. Hardinge* (1888) 20 Q. B. D. 782 that 'purchaser' in the Bankruptcy Act is used in the wider sense commonly given to the term in English Law and not in the mercantile sense of a person who has brought something by contract of purchase and sale. It is the view of the Madras High Court in a ruling cited in *Official Receiver, Trichinopoly v. Somasundaram Chettiar*, 34 Ind. Cas. 602: 30 M. L. J. 415, that the English interpretation of the word 'purchaser' applies also to the Indian law of insolvency. In that ruling it was held that the trustees can be regarded as purchasers whereas in the English ruling referred to, a father was regarded as a purchaser from his son, although in neither case was there any question of contract of sale. Both rulings go on further to consider the question of valuable consideration. In the English ruling it is stated that the father, in good faith, to induce his son what he ought for his family, did enter into a dealing with his son and gave valuable consideration. In the Madras case it was held that "a responsibility taken by a person to whom properties are transferred in consideration of his taking onerous work seems to fall within the expression valuable consideration."

Scope of section.—A proceeding under sec. 36 of the Act is not in the nature of a suit. It is only an incidental proceeding in the course of a more comprehensive one for adjudging a person insolvent, *Lalji Sahay v. Abdul Gani*, 15 C. W. N. 253: 12 C. L. J. 452. When a Receiver seeks to set aside a transfer he should file a written statement (similar to plaint in ordinary suits) setting forth the grounds on which the transfer is challenged; the transferee should put in a written reply and the proceedings should continue very much as in a suit. Such matter should not and could not be disposed of in a summary way, *Channu Lall v. Luchman Sonar*, 39 All. 391. "Sec. 36 is wider in scope than sec. 53 of the T. P. Act. Under sec. 36 it is not necessary to prove or show that the transfer was made with intent to defeat or delay creditors. All that is necessary to show is that the transfer is made within 2 years of the adjudication of insolvency unless it is a transfer made before and in consideration of marriage," *Muhammad Habibulla v. Mustaq Hossain*, 39 All. 95. See also *Dronadula Sriramulu v. Ponakavira*, 45 M. L. J. 105, *supra*. "It is not competent for the Court to send the case to a munsiff for an enquiry," *Upendra v. Brindaban*, 33 Ind. Cas. 188. In proceedings under sec. 36 the Court is bound to take evidence and cannot rely on statements

made before the Receiver, *China v. C. Kumar*, 35 Ind. Cas. 906. *Abdul Azio v. Khirode*, 41 Ind. Cas. 411. Where a receiver reported to the District Judge that a certain mortgage made by an insolvent was liable to be set aside, the Judge cannot refer to a Munsiff for report whether the mortgage was *bona fide* but must decide it himself, *Jagannath v. Lachmandas*, 12 A. L. J. 880.

Who can make the application.—"When an *ad interim* Receiver has been appointed in insolvency proceedings, the Receiver appointed after adjudication does not stand in the shoes of the interim Receiver. He stands on a very much higher footing. The property of the judgment-debtor vests in him, he holds it for the benefit of the whole body of creditors, and he has special rights and special duties imposed upon him by statute. Amongst the rights conferred upon him is the right to make an application under Sec. 36 now Sec. 53, and this statutory right which has been conferred upon him cannot be taken away by an order in a proceeding to which he was not a party. An order as to the validity of a transaction to which the debtor and the creditors were alone impleaded as parties while the debtor's estate was in the custody of the *ad interim* Receiver does not operate as *res judicata* as against the Receiver appointed after adjudication and does not debar him from making an application under sec. 36. *Ramsarna Mander v. Shiva Parshad*, 58 Ind. Cas. 783. The proper person to make an application under this section for avoidance of the transfer is the Receiver in whom the insolvent's property has vested. But when the application was made and prosecuted in the Lower Court by the creditors, the Receiver not having been joined as a party and the order proposed to be made did not in any way affect the position of the Receiver, the appeal was heard and disposed of in the Receiver's absence, *Lali Sahay v. Abdul Gani*, 15 C. W. N. 253: 12 C. L. J. 452. In a list of debts filed by an insolvent one B. was shown as a mortgagee of certain properties. K. who was one of the creditors challenged the mortgage. The Judge rejected his application and referred him to Civil Court. *Held*, the Judge was bound to enquire into the validity of the mortgage in insolvency proceedings, *Khusali Ram v. Bholarmal*, 37 All. 252: 28 Ind. Cas. 57.

It was for the Receiver to take action under sec. 53 and not for the Court to do so on a petition for adjudication by a creditor. *Anni Beddi v. Chinna Appi Reddi*, 41 M. L. J. 606: 1921 M. W. N. 816: 14 I. W. 639. The proper person to move in the matter of get-

ting the transfer annulled is the Receiver, *Iswar Das v. Ladha Ram*, 62 Ind. Cas. 624. It is the Receiver and no one else who is empowered to take action for the cancellation of the sale deeds under Sec. 53. *Ram Sundar v. Ram Charit*, 51 Cal. 663: 1924 A. I. R. (C.) 827: 79 Ind. Cas. 326.

A transfer by the insolvent within two years of insolvency is voidable against the Receiver; so he is the proper person to impeach the fraudulent transfer by the insolvent, and proceedings to annul a transfer under Sec. 53 of the Provincial Insolvency Act should be taken in the name of the Receiver but if the Receiver refuses to interfere then a creditor can proceed with the matter with the leave of the Court. Until however the Receiver has refused or declines to act no one else can do so. But if no Receiver is appointed, the matter is otherwise. In that case the Insolvency Court can itself move the matter being brought to its notice by any of the creditors. *Bansilal Agarwal v. Rangalal Agarwal*, 1923 A. I. R. 97 (Nag.).

The Receiver in framing a schedule of creditors does not decide judicially or finally upon contested claims and his framing a schedule did not preclude the Court from entertaining an application by the Receiver to annul the transfer under sec. 36, *Khadir Shah v. Official Receiver. Tinnevely*, 41 Mad. 30. "It is the duty of the Insolvency Court to be astute to look after the insolvency proceedings so as to ascertain whether anything can be saved for the creditors. But when a Receiver is appointed and he is a gentleman of legal training it is better to leave him to take the initiatory steps to get voidable or fraudulent transfers annulled," *Kunj Beharee v. Madhu Sodan*, 50 Ind. Cas. 117.

Procedure where no Receiver appointed or where Receiver refuses to take action.—The language of Sec. 53 makes it incumbent on the Court to annul every transfer of property made by an insolvent if the transferor is adjudged insolvent within two years from the date of the transfer provided it comes to a finding that such transfer was not made in good faith and for valuable consideration. The section contemplates that action under it will be taken by the Receiver but it does not mean that even where the Receiver refuses or neglects to act no one else can set the proceedings under this section in motion. *Daryai Singh v. Kunj Lal*, 75 Ind. Cas. 995; *Pirthi Nath v. Basheshwar Nath*, 69 Ind. Cas. 403. There is no rule that the Receiver alone and nobody else can move the District Court to annul an

alienation by the insolvent under Sec. 53 or 54 of Act V of 1920. A creditor can at any time during the pendency of the insolvency proceedings move the Court to take action under Sec. 53 or 54 of the Act if the Official Receiver has refused to move in the matter on the request of the creditor. *Anantha Narayana Iyer v. Sankara Narayana Iyer*, 57 Mad. 673: 79 Ind. Cas. 395: 1924 A. I. R. (Mad.) 345. If no Receiver is appointed in an insolvency case the Insolvency Court can itself move under Sec. 53 on the matter being brought to its notice by a creditor. *Seth Sheo Lal v. Girdhari Lal*, 78 Ind. Cas. 140: 1924 A. I. R. (Nag.) 361.

Onus.—Under Sec. 36, now 53, of the Provincial Insolvency Act the onus of proving that a mortgage executed by an insolvent within 2 years before his adjudication as such was made in good faith and is therefore binding on the Receiver is on the mortgagee, *Nilmoni Chaudhuri v. Basanta Kumar*, 19 C. W. N. 865; *Hasiruddin v. Mokima Bibi*, 22 C. W. N. 709; *Anant Ram v. Yusoof*, 36 Ind. Cas. 903, *Hem Raj v. Ramkissen*, 2 P. L. J. 101, *Girdharilal v. Saratkissen*, 138 P. W. R. (1918) 667. Under Sec. 55 of the Presidency Towns Insolvency Act as under Sec. 36, now 53, of the Provincial Insolvency Act, a mortgagee setting up a mortgage within two years of the insolvency of the mortgagor has the onus cast on him to show that the transaction was one executed in good faith and for consideration. The burden is, if anything, stronger where the mortgage set up carries interest at the usurious rate of 24 per cent. and was executed by a young man who had just come of age and who was squandering his property in dissolute course, *Official Assignee, Madras v. Sambanda Mudaliar*, 43 Mad. 739: 39 M. L. J. 345. Though ordinarily the burden of proving that a transaction is a fraudulent and collusive one, intended to defeat or delay the creditors, and is merely *benami* is upon the person who asserts it (*Seth Maniklal v. Raja Bejoy Singh*, 1921 M. W. N. 80 P. C.) but under the Insolvency Act this onus is shifted on the transferee and not upon the Receiver though he asserts it. Where a person, within two years prior to being adjudicated insolvent makes a transfer of his property, the burden of proving that the transfer was both for valuable consideration as well as in good faith is upon the transferee. The mere fact that valuable consideration has been paid for the transfer does not necessarily lead to an inference of good faith also. *Gopal v. Ramkrishna*, 62 Ind. Cas. 289. The person impeaching a transaction by the insolvent has only to prove that it took place within two years of the insolvency of the transferor, and when

this has been done, the onus is shifted on to the transferee to establish the *bona fides* of the transaction which he seeks to maintain. *Bansilal Agarwal v. Bangalal Agarwal*, 1923 A. I. R. 97 (Nag.), *Gopal Rao v. Hiralal*, 83 I. C. 246, 1925, A. I. R. (N.) 225.

Issues to be Proved.—Under Sec. 53 every transaction which an insolvent enters into within 2 years previous to his insolvency is treated as *prima facie* invalid and the burden is on the insolvent or the alienee to show that the transaction impeached is a valid and a bona fide one. *Both good faith and valuable consideration have to be proved.* The circumstances under which the deed came to be executed, the covenants made therein, the conduct of the parties both at the time and subsequently, have all to be taken into consideration. It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; if he does it with a view to his being indebted at a future time it is equally fraudulent and ought to be set aside. A man can commit what may be called compendiously “anticipatory fraud” and effect the transfer of his properties with a view to get into debts and prevent the creditors getting at his property. If the transfer was really intended to be carried out and was made bona fide for saving the insolvent from incurring debts and ruining himself, the transfer would not be interfered with, but if circumstances show that the transferor was actually screening his properties from the reach of his future creditors the transfer would be a fraudulent one. *Official Receiver, Tanjore v. Vedappa Mudaliar*, 47 M. L. J. 431; 1924 M. W. N. 506; 82 Ind. Cas. 450; 1924 A. I. R. (Mad). 865.

Adjudged within two years.—“The section should be read with Sec. 16 (6) now 28 (7) of the Act and an order of adjudication relates back to and takes effect from the date of the presentation of the petition for the purpose of making the property of the insolvent liable to the creditors, and a transfer made within 2 years from the date of the petition comes within the provisions of Sec. 36.” *Rakhal Chandra Purkait v. Sudhindra Nath Bose*, 46 Cal. 991; 24 C. W. N. 172; 52 Ind. Cas. 747, *T. V. Sankara Narain v. Alagiri*, 49 Ind. Cas. 283; 1918 M. W. N. 487; 24 M. L. T. 149; 35 M. L. J. 296, By the enactment of Sec. 4 in the present Act V of 1920 the Insolvency Court is not merely confined to the consideration of any transaction within two years as provided in Sec. 53, but to any transaction whether before or within two years from the date of adjudication which

has the effect of putting the property *benami* and not available to creditors. *Kochu Mahomed Tharagon v. Sankaralinga Mudaliar*, 40 M. L. J. 219: 62 Ind. Cas. 495. See also *Bhagwant v. Munim Khan*, 8 Ind. Cas. 1115: 6 N. L. R. 146; *Sheonath Sing v. Munshiram*, 42 All. 433: 18 A. L. J. 449.

The view expressed in the cases cited above has been dissented from in *Ghulam Muhammad v. Panna Ram*, 72 Ind. Cas. 433, in which it has been held that Sec. 16 (6), now 28 (7), does not govern Sec. 36, now 53, and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under this section, following *Jokhan Sing v. Deputy Commissioner of Fyzabad*, 23 Ind. Cas. 924. "The meaning of a statute is not to be interpreted with reference to what its framers intended to do but with reference to the language which they did in fact employ."

Transfers more than two years old.—Under the old Provincial Insolvency Act, III of 1907, a Receiver could not question a transaction under Sec. 36, now 53, which was several years old. His proper remedy was to institute a suit under Sec. 53 of the T. P. Act. A judgment declining to adjudicate upon such a matter could not operate as *res judicata*. *Gaura v. Nawab Mohammad*, 64 Ind. Cas. 523. But under the present Act an Insolvency Court has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by the special provisions of the Insolvency Act—where, for example, a trustee is given a higher title than the original debtor. But the Insolvency Court also has to apply and to decide all questions of general law including such questions as are raised by Sec. 53 T. P. Act. In a case where it was alleged that the insolvent had sold his property before the insolvency merely with intent to defraud and delay his creditors, there ought to be a full enquiry between the Receiver and the creditor on the one hand and the debtor and his family on the other, as to the *bona fides* of the transaction and in the main the provisions of the C. P. C. are applicable to such enquiry, and there ought to be sworn testimony and the same care used with regard to documents and the admission and rejection of documentary evidence as in a suit. A decision on a question whether an insolvent three years before sold his property merely with intent to defraud and delay his creditors, is a decision on a question of title within the meaning of Sec. 4 of the Insolvency

Act and is appealable under Sec. 75 (2). *Shikri Prasad v. Hafiz Aziz Ali*, 19 A. L. J. 862: 63 Ind. Cas. 601.

Voidable.—"That which is void can be treated as non-existent and of no binding force and effect, but that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal," *Jangi Lal v. Laddu Ram*, 1919 Pat. (F. B.) 105. "The transfer falling under sec. 36, now 53, remains valid unless and until set aside at the instance of the Receiver. The word 'void' means voidable." *Mirappa v. Raman Chettier*, 42 Mad. 322: 10 M. L. W. 59: 52 Ind. Cas. 519. A transfer of property falling under Sec. 53 of the T. P. Act remains valid unless and until set aside at the instance of the official Receiver, *Sharfuz-Zaman v. Sir Henry Stanyon*, 70 Ind. Cas. 753: 1923 A. I. R. 80 (Oudh).

Notice.—"Where a question arises whether a transfer should or should not be annulled under this section it is requisite that the transferee should have proper notice that proceedings were contemplated under this section and a proper opportunity to put his case before the Court." *Jugulpada v. Ganes Chandra*, 44 Ind. Cas. 168. "The only proper course open to the Court is to issue notice upon the transferee to show cause why the transfer should not be set aside," *Upendra v. Brindābon*, 44 Ind. Cas. 188.

Effect of annulment by Court.—Where a transfer is annulled by the Court the property reverts to the transferor and his property becomes vested in the Receiver and available for distribution to the creditors generally, *In Re. Farnham*, 1895, 2 Ch. D. 800. If a person in whose favour a sale executed by an insolvent, pays off a mortgage on the transferred property, he is entitled to be entered as a scheduled creditor to the extent of the amount paid by him even though the sale is set aside by the Insolvency Court under Sec. 53 as fraudulent and void as against the Receiver. *Ram Prasad v. Seth Jaskaran*, 82 Ind. Cas. 488: 1925 A. I. R. (Nag.) 73.

Limitation for Applications under this Section.—The period of limitation prescribed by Art. 181 of Sch. I to the Limitation Act is confined to applications under the C. P. C., and does not apply to an application under Sec. 36, now 53, of the Provincial Insolvency Act made by the Official Receiver. No period of limitation is prescribed for such an application, which may be made at any time during the pendency of the insolvency proceedings. *Duraiyya Solagan v. Venkatarām Naicker*, 60 Ind. Cas. 123. Whether the Court chooses to

take action under this section or is moved by the Receiver or by a creditor, it is not bound by any period of limitation, and Art 181 Sch. I of the Limitation Act has no application to such a proceeding. *Petta Ramaswamiar v. Subramania Iyer*, 79 Ind. Cas. 443: 1925 A.I.R. A. I. R. (Lah.) 331, *Durjai Singh v. Kunj Lal*, 75 Ind. Cas. 995: 1924 A. I. R. (Lah.) 553, *Hemraj Champalal v. Ramkrishna Ram*, (1917) 2 P. L. J. 101.

Appeal.—An appeal lies against an order annulling a voluntary transfer, under Sec. 75 (2), Schedule I *infra*.

54. [37] (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

NOTES.

Review.—This is section 37 of Act III of 1907, and is based upon Sec. 48 of the Bankruptcy Act, 1883. The object of the bankruptcy law being the equal division of the bankrupt's estate amongst his creditors, the bankruptcy law contains an enactment by which payments or transfers of property made by the bankrupt with the view of giving a preference to one particular creditor over the general body will be set aside and the money or property will be brought into the bankrupt's estate.

Object of the section.—The object of Sec. 37, now sec. 54, is to protect the interest of the whole body of creditors over whom an undue preference has been given in favour of other creditors. The same

principle applies to a transaction which is sought to be impeached under Sec. 231 of the Companies Act so that a disposition of a company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of creditors. Therefore, a person who is not a creditor of a company but is a debtor cannot impeach a transfer made by the company on the ground of undue preference. *Ram Swarup v. Jagat Ram*, 2 Lah. 102: 59 Ind. Cas. 977.

Judicial Proceeding.—A decree obtained against the judgment-debtor is not binding against the Receiver in insolvency. There is always a possibility of its having been collusive between the parties when the judgment-debtor has nothing in the world to lose himself with and does not care whether he has decrees for an unlimited amount against him or not. *Mir Sha v. Rahim Bux*, 1923 A. I. R. 33 (All.).

"Unable to pay debts as they become due."—"In determining the question whether a person is able or unable to pay his debts as they become due from his own money, the fact that he has money locked up which at a later period may be available for the payment of his debts is immaterial," *Nripendra v. Asutosh*, 20 C. W. N. 420.

"Preference."—The authorities such as *Sharp v. Jackson*, L. R. 1899. App. Cas. 419 show that the word 'preference' imports and involves freedom of choice, and that no transfer which is not voluntary in the sense that it is a free act of the insolvent is a preference which under the Act is to be deemed fraudulent and void as against the Official Assignee. *Madho Ram v. The Official Assignee*, 27 C. W. N. 611. The law provides that every conveyance or transfer made by a debtor of his property, every charge made by him thereto, every judicial proceeding affecting his property taken or suffered by him, is fraudulent and void against the Receiver provided the following 4 conditions are fulfilled:—(1) the debtor must at the date of the transaction be unable to pay his debts, (2) the transaction must be in favour of a creditor, (3) the debtor must have acted with the view of giving such a creditor a preference over his other creditors, (4) the debtor must be adjudicated insolvent within 3 months after the date of the transactions," *Nripendra Nath Sahu v. Asutosh Ghosh*, 19 C. W. N. 157 and also in 20 C. W. N. 420, *Kalinath v. Ambika prasad*, 41 Ind. Cas. 399, *Mohandas v. Tikamdas*, 10 S. L. R. 123, *Sharp v. Jackson*, 1899, A. C. 419.

Motive.—"Whether the debtor acted with the *view* of giving the mortgagee a preference over other creditors, a particular transaction may be set aside as a fraudulent preference only if it is proved that it was carried out with the *substantial and dominant view* of giving the creditor a preference over the other creditors. This need not be the primary result aimed at; it is sufficient that it should be the object aimed at in bringing about the primary result," 20 C. W. N. 420 *supra*, "*Preference* implies an act of free will and there can be no *preference* where the act is the result of pressure," *Nripendranath v. Asutosh*, 19 C. W. N. 157. "Where the dominant motive of the debtor in making the transfer was to save himself from exposure or from a criminal prosecution, in such a case, as the law regards only the motive of the debtor, it cannot be held that the transfer was voluntary or amounted to a fraudulent preference. The leading case on the point is *Esparthe Taylor, In Re. Goldsmid*, 18 Q. B. D. 295. The general principles of law regarding transfers made in favour of one creditor have been explained by Rattigan C. J. in *Lahbu Ram v. Puran Chand*, 130 P. R. 1919, *Umruo Singh v. Punjab National Bank*, 3 L. L. J. 44 followed in *Puram Chand v. Puran Chand* 1923 A. I. R. 652 (Lahore). In deciding "whether a particular transaction was entered into *bona fide* or not it is an error to take each fact which militated against the *bona fides* of the transaction separated from the rest of the facts and proceeding to demonstrate that it was quite consistent with good faith. It is essentially necessary that the facts should be considered in relation to each other and weighed as a whole," *Seth Ghanshamdas v. Uma Prasad*, 23 C. W. N. 817 P.C. In order to hold that a transfer by a debtor in favour of a creditor constituted a *fraudulent preference* within the meaning of Sec. 54, the Court must be satisfied that the *dominant or substantial* motive of the debtor in making the transfer was to *prefer* the particular creditor and not to secure some particular advantage for himself. A debtor approaches one of his creditors for a fresh loan which he required for business purposes. The creditor refused to advance the loan unless his previous loan was also secured. The debtor then agreed to grant him a mortgage of certain property to secure the previous debt and the fresh advance. *Held* that the mortgage did not constitute a fraudulent preference within the meaning of Sec. 54. *Laulat Ram v. Deoki Nandan*, 75 Ind. Cas. 861; 1124 A. I. R. (L.) 668.

The section has no application to a lease granted for good consideration shortly before the filing of an insolvency petition unless the object thereof is to give preference to one creditor over the other. If the lease is found merely a *benami* transaction, the insolvent still retaining possession of the property leased it can be avoided, *Desraj v. Sagarmull*, 38 All. 37. A transfer is void when the effect is to leave the debtor without the means of paying his present debtors, *Chidamuram v. Srinivasa*, 18 C. W. N. 841 (P. C.)

A creditor can put pressure on his debtor notwithstanding that the debtor is in embarrassed circumstances but a debtor who gives an unfair preference to one creditor so as to reduce the aliquot share of the other creditors acts fraudulently and no title is given to that particular creditor against the Assignee, *Dadapa v. Bishnudas*, 12 Bom. 424. In *Jukes, In Re. Official Receiver*, 1902, 2 K. B. 53, Wright J. said "I cannot help thinking that if a creditor takes the whole or substantially the whole of debtor's property in payment of a past debt knowing that there are creditors, he cannot be said to be acting in good faith," *Duolat v. Panduram*, 55 Ind. Cas. 67.

The law however regards only the motive of the debtor, and if the *dominant motive* of the debtor in making the transfer or payment is to save himself from exposure or from a criminal prosecution it cannot be said that the transfer or payment is voluntary or amounts to a fraudulent preference. *Puran Chand v. Punjab National Bank, Ltd.*, 3 U. P. L. R. 6: 59 Ind. Cas. 578. So if when making a transfer in favour of a creditor the debtor in fact was not really *intending to prefer* the creditor or to confer any benefit on him, but the dominant motive or object which influenced the debtor was the desire to secure a benefit for himself, the transaction cannot be treated as having been a fraudulent preference within the scope of Sec. 54 of the Provincial Insolvency Act, V of 1920. *Bhagwan Das v. Chutan Lal*, 19 A. L. J. 240: 62 Ind. Cas. 732. That an act done by the insolvent not as a free agent but under pressure or as a purely voluntary act in order either to protect the insolvent from legal proceedings or to gain for him some immediate advantage would not be a fraudulent preference, although it might have the result of preferring one creditor at the expense of others. What the Court has to ascertain is, what was the dominant intention in the mind of the insolvent at the time the act was done, and that it is for the creditors to

establish that the principal object of the transaction was intended to be fraudulent preference. *M. A. Roebern v. Tollkoffer*, 2 Rang. 193.

Vide Notes also under Sec. 6 supra.

Onus.—It is important to state what a trustee has to establish in order to prove that a payment has been made as a fraudulent preference. At common law there was nothing to prevent a debtor from preferring one creditor to another, and the statute of Elizabeth (13 Eliz. C. 5) leaves the common law unchanged. The principle now known as fraudulent preference was first formulated in Sec. 92 of the Bankruptcy Act, 1869. This Section, but slightly altered, was reproduced by the Act of 1883, and its successor formed Sec. 44 of the present Act. The conditions which section 44 requires are plain. *First*, that the payment is made by a person unable to pay his debts as they become due from his own money; *secondly*, that it in fact prefers one creditor over others; *thirdly*, that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made. It has been decided many times that the mere fact that the payment does prefer one creditor over other does not make it void against the trustee in bankruptcy. As Mellish, L. J. said in *Ex parte Topham*, L. R. 18 Ch. 614, quoting from the judgment of Bacon, V. C. in *Ex parte Blackburn*, (1871) L. R. 12 Eq. 358, ‘but then Sec. 92 of the Act of 1869 adds another qualification or condition which is the very life and essence of the enactment, the payment so made must, in order to be void, be made in favour of any creditor, with a view of giving such creditor a preference over other creditors,’ so that unless it can be made clearly apparent and to the satisfaction of the Court which has to decide, that the debtor’s sole motive was to prefer the creditor paid to other creditors, the payment cannot be impeached *although it can be obviously in favour of a creditor*. Lord Esher in *Newprance & Garard’s Trustee v. Hunting* (1897) 2 Q. B. 19 has said: “The question is, whether in fact he had intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I don’t think that is true for this purpose. I think, one must find out what he really did intend.” In *Ex parte Lancaster*, 22 Ch. D. 695, Cotton L. J. has definitely stated “the onus lay on the trustee to give evidence that the view entertained by the debtor was to prefer the creditor. “Dominant or substantial” not necessarily the “sole” view is that which has, since *Ex parte Hill*, 23 Ch. D. 695,

been interpreted to be the proper meaning of the word: See per Brown L. J. in 23 Ch. D. 704." Evidence of kinship would *prima facie* discharge the onus upon the trustee as in *Laurie*, 5 Mans. 48: 16 L. J. Q. B. 431 and *Ex parte Topham*, 8 Ch. 614. There are other facts which do likewise; and if the onus is discharged, no doubt the debtor must displace the *prima facie* evidence of a dominant intention to prefer given by the trustee. This can be done by proving that the payment was made under pressure, or for one or other of the many reasons indicated by Phillimore, J. in *Re. Ramsay* (1913) 2 K. B. 80. But the trustee must first discharge the onus that lies upon him. Merely the fact of payment with its attendant result of preference is not sufficient. The Court cannot speculate or surmise in order to supply the deficiency. Without evidence the matter must be left where it is, unexplained and without any character given to, or purpose proved in relation to the mere payment." In *Re. Cohen, Ex parte the Trustee* (1924) 2 Ch. D. 514.

Where the act is impeached as fraudulent preference the onus of proof lies on the Receiver, *Ex parte Lancaster, Re. Mursden*, 1883, 25 Ch. D. 311. And it has been held that the burden of proof lies on the Receiver even if the debtor had been insolvent at the time of the payment and knew himself to be so, *Re Laurie, Ex parte Green*, 6 Mans. 48. The law as to the burden of proof is stated clearly in *Williams on Bankruptcy*, 10th Ed. p. 303. "One balance of authority would seem to be in favour of holding that the trustee must give some evidence of a view to prefer on the part of the debtor, other than the mere fact that he was insolvent." *Janki Ram v. Official Receiver, Coimbatore*, 78 Ind. Cas. 16: 1925 A. I. R. (M.) 329, Where a sale by the insolvent within three months of his insolvency is impugned as a fraudulent transfer within the meaning of Sec. 37, now 54, of the Provincial Insolvency Act, the burden is upon the Receiver or the creditors who impugn the transfer to make out positively that the transfer was made with a view to give preference. Unless such an intention is made out the mere fact that the transfer would have such an effect is not sufficient to bring the case within the scope of the insolvency law, *Bappu Rediar v. Official Assignee, Tinnevely*, (1919) M. W. N. 576: 37 M. L. J. 246, following *Official Assignee, Madras v. Mehta & Sons* (1919), M. W. N. 293, *Nripendranath v. Asutosh*, 43 Cal. 640: 20 C. W. N. 420: 33 Ind. Cas. 548. After it has been established that the assignments by the insolvent to a creditor was fraudulent and void, the onus lay upon the creditor to show that not

noly did the creditor give consideration for the assignment but also that he acted in good faith. *Madho Ram v. Official Assignee*, 27 C. W. N. 611. The reason why the onus lay upon the creditor may be found in the judgment of the Court of Appeal in *Ex parte Tate*, 35 L. T. 531 (1876).

Test.—The test for determining whether a transfer or payment made by a debtor in favour of or to a creditor does or does not amount to a fraudulent preference is, whether the transfer or payment is voluntary. If the dominant motive of the debtor in making the transfer is to save *himself* from exposure or from a criminal prosecution it cannot be said that the transfer or payment is voluntary or amounts to a fraudulent preference. *Puran Chand v. Punjab National Bank, Ltd.*, 3 U. P. L. R. 6: 59 Ind. Cas. 578. Where a debtor in order to save himself from exposure and proceedings in Court and in order to appease the creditor made an equitable mortgage in his favour, can it be said that under these circumstances the mortgage was created with a view of giving preference to that creditor over the other creditors? The Court held "I think, not. In a similar case of a mortgage in favour of the Punjab National Bank a similar question arose and Wilberforce J. held "that the dominant motive in making the transfer was to save himself from exposure or from a criminal prosecution, and in such a case the law regards only the *motive* of the debtor. It cannot be held that the transfer was voluntary or amounted to a fraudulent preference." *Puran Chand v. Puran Chand*, 1923, A. I. R. 652 (Lahore). Where the chief motive of a debtor in transferring his property is to benefit himself rather than his creditor the transaction cannot be considered to be a fraudulent preference under Sec. 54, *Bhagwan Das v. Chutan Lal*, 19 A. L. J. 240: 62 Ind. Cas. 732. "To ascertain whether the giving of a preference to a particular creditor i.e. putting that creditor to a better position relatively to the other creditors was the dominant view in the debtor's mind, the proper test to be applied is, was the act done voluntarily, a question the solution of which depends primarily on the enquiry from which party did the proposition originate? A voluntary disposition is an act moving from the debtor, a voluntary payment is a payment made simply by the act and will of the party making it. In every case the state of the mind of the debtor is the paramount consideration; the intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns," *Nripendranath v. Asutosh*, 19 C. W. N.

157. See also *Anjappa Chetty v. Nanjappa*, 18 M. L. J. 189: 2 M. L. T. 57. "It is an error to take each fact which militated against the *bona fides* of the transaction separated from the rest of the facts and to proceed to demonstrate that it was quite consistent with good faith. It is essentially necessary that the facts should be considered in relation to each other and weighed as a whole," *Seth Ghunshamdas v. Umaprasad*, 23 C. W. N. 817 P. C. Where the object of the transfer was, under the cloak of a company newly floated, to remove the assets of the bankrupt from the reach of the creditors and to retain for the bankrupt the benefit of them as principal shareholder and thereby defeat and delay his creditor, and where only one creditor incidentally obtained a benefit from the transaction by the allotment of certain shares of the newly floated company to him in satisfaction of his debt due from the bankrupt, this did not prevent the transaction from being void under the statute of Bankruptcy. *Ex parte Trustees*, (1923) 2 Ch. D. 1.

Sec. 53 T. P. Act.—Under the present section of the Insolvency Act actual fraud need not be proved as under sec. 53 of the T. P. Act. It is only necessary to show that a transfer has been made with a view to show preference to one creditor to whom a debt may be due over another creditor, *Balmokand v. Ayya Sing*, 18 P. W. R. 1912: 26 P. L. R. 1912: 13 Ind. Cas. 68. In an application under Sec. 54 of the Provincial Insolvency Act it is not sufficient to prove that the transfer had the effect of giving preference to a creditor; it must be proved further that it was the view or the intention to give that creditor a preference. *Bolisetti Mopayya v. Kotayya Kommuti Ramayya Rice Mills*, 63 Ind. Cas. 916. The Privy Council in the case of *Mushahor Sahu v. Hakim Lal*, 43 Cal. 521 P. C. has held that "as a matter of law, their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving other creditors unpaid."

Exceptions. Pressure.—Sir George Jessel, Master of the Rolls, observed in *Ex parte Hall*, L. R. 19 Ch. D. 480, "Can that delivery of the bills to Brown be said to have been in consequence of *bona fide* pressure on the part of the appellant? It is plain that it was *voluntary* act of the bankrupt. It would be absurd to call it pressure. A man says to his creditor "I am about to become bankrupt, or I shall stop payment in a week." The creditor says "Pay me my debt or

I will sue you for it." Can that be called *bona fide* pressure by the creditor?" It would be absurd so to call it. A constant demand for payment of debt is not pressure. *Madhoram v. Official Assignee*, 27 C. W. N. 611. A transaction can be avoided as fraudulent preference when the transaction is proved to be the result of pressure brought to bear on the debtor, i.e., pressure which must have operated on the mind of the debtor as the dominant influence affecting him, and where the preference would not have been made but for the importunity of the creditor and the desire of the debtor to prefer. But where the debtor was acting in the ordinary course of business, as by meeting bills as they fell due or even before they fell due (*Re. Clay, Ex parte The Trustee*, 3 Mans 31) or where the debtor was acting in the fulfilment of a prior agreement (*Nripendranath v. Asutosh*, 19 C. W. N. 157 *supra*) or where the transaction was in performance of a special contract (*Bills v. Smith*, 34 L. J. Q. B. 68) such transactions cannot be avoided as fraudulent preferences. Where days before a person was adjudicated insolvent and his property had vested in the Official Assignee, such person had not spontaneously but in consequence of being pressed, assigned to a particular creditor certain properties, held by Stuart C. J., that such assignment was not voluntary and was therefore fraudulent and void, *Sheopershad v. Miller*, 2 All. 475. See also 6 All. 84 P. C. Where an insolvent had rendered himself liable to criminal proceedings which were threatened by his creditor unless he took immediate steps to secure the creditor against loss and as a result he deposited his title deeds as an equitable mortgage, held, that the dominant motive of the debtor in making the transfer was to save himself from exposure or from a criminal prosecution, and in such a case, as the law regards only the motive of the debtor, it cannot be held that the transfer was voluntary or amounted to a fraudulent preference, *Umrao Singh v. Punjab National Bank*, 3 L. L. J. 44: 59 Ind. Cas. 578, followed in *Puran Chand v. Puran Chand*, 1923 A. I. R. 652 (Lahore).

Secured Creditor.—In *Jadu Nath Halder v. Manindra Nath Chandra*, 27 C. W. N. 816, the insolvents executed a deed of conveyance with regard to some of the mortgaged properties on the 23rd May 1917. The mortgagors were adjudged insolvents in July 1917. An adjudication order was made and a Receiver was appointed of the properties of the insolvents. The Receiver applied to the District Judge for avoiding the sale under Sec. 37 now 54. The High Court held that the question in these cases is whether the sale was to a

'creditor' with a view of giving that creditor a preference over the other creditors. The answer to this question depends upon whether Sec. 37 now 54, applies to these cases. "The purchasers were secured creditors and they were entitled to be paid to the full extent of their debts so secured in preference over other creditors. There is a distinction in the Act between a creditor and a secured creditor, and the purchasers in this case do not come within the expression 'creditor' as contemplated in Sec. 37. Sec. 37 does not apply to these purchases."

Surety.—A person who stands surety for the payment of a debt by the insolvent is a creditor within the meaning of this section, *Rodrigues v. Ramaswami*, 40 Mad. 783. A surety, as such, is clearly a creditor of the insolvent. He is clearly a creditor as soon as he pays the money on his behalf. Where the insolvent was unable to pay his debts as they became due from his money, and the person in whose favour the transfer was made was a creditor, and the effect of the agreement to transfer was to pay the transferee the major portion of the debt due to him by the transferor, so that the properties might not go into the general fund to be divided rateably amongst all the creditors, held, that the transfer is void as a fraudulent preference. *Siddik Ahmed v. M. K. M. Firm*, 1923 A. I. R. 149 (Rangoon): 79 Ind. Cas. 813.

Annulment.—After the annulment the property vests in the Receiver. Where an alienation by the insolvent is annulled under Ss. 36 and 37, now Ss. 53 and 54, the alienee may prove as an unsecured creditor for his just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor, *Devi Dial v. Sundar Das*, 51 Ind. Cas. 720: 65 P. R. 1919.

Who can set the law in motion.—The proper procedure is for a Receiver to make an application for the avoidance of the transfer or at least to be a party to it. Where, however, the Receiver fails to move in the matter it is competent to a creditor to make the application. *Nikka Mal v. Marwar Bank, Ltd.*, 52 Ind. Cas. 188. There is no rule that the official Receiver alone and nobody else can move the District Court to annul an alienation by the insolvent under Ss. 53 & 54 of Act V. of 1920. A creditor can, at any time during the pendency of the insolvency proceedings, move the Court to take action under Ss. 53 & 54, if the Official Receiver has refused to move in the matter on the request of the creditor. *Hemraj Champa Lal v. Ramkrishna Ram*, (1917) 2 P. L. J. 101. Where

Sec. 55.] PROTECTION OF BONA FIDE TRANSACTIONS. 237

the Official Receiver declines to take action a creditor can apply to the Court to allow him to use in the Official Receiver's name, in order to recover the insolvent's property or to set aside a voluntary transfer, or to avoid a fraudulent preference for the benefit of the creditors, and the requirements of law are satisfied by making the Official Receiver a party to an application made by a creditor to take action under Ss. 53 & 54 of the Act. *Ananta Narayana Iyer v. Sankara Narayana*, 47 Mad. 673: 79 Ind. Cas. 395: 1924 A. I. R. (M) 345. Where no Receiver has been appointed a creditor is competent to move the Insolvency Court to annul a transaction under Sec. 37, now Sec. 54, of the Act. *Gopal Rao v. Hirulal*, 83 Ind. Cas. 246. 1925 A. I. R. (Nag) 225.

Proceedings under Ss. 36 & 37, now 53 & 54, cannot be started on a Receiver's Report, but if started they can be validated by converting the Report into a properly stamped petition. The Court has jurisdiction to annul alienations by the insolvent's transferee where the transfer is merely a colourable transaction and the transferee only a *benamidar*. The second transferee is a necessary party. *Jagannath v. Narain*, 52 Ind. Cas. 761.

Limitation.—An application for setting aside a transfer of property under Sec. 54 may be made at any time during the pendency of the insolvency proceedings and there is no period of limitation provided for such an application. *Hemraj Champalal v. Ramkrishna Ram* (1917) 2 P. L. J. 101. Act. 181 of Sch. I of the Limitation Act has no application to such proceedings. Where the Court chooses to take action itself under this Section or is moved by the Receiver or by a creditor, it is not bound by any period of limitation. *Daryai Singh v. Kanai Lal*, 75 Ind. Cas. 995 following *Pirithi Nath v. Bashe-shar Nath*, 69 Ind. Cas. 403.

55. [38] Subject to the foregoing provisions of this Act with respect to the *Protection of bona fide transactions.* effect of insolvency on an execution, and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency—

(a) any payment by the insolvent to any of his creditors;

(b) any payment or delivery to the insolvent;

(c) any transfer by the insolvent for valuable consideration; or

(d) any contract or dealing by or with the insolvent for valuable consideration:

Provided that any such transaction takes place before the date of the order of adjudication, *and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.*

NOTES.

Review.—This is section 38 of Act III of 1907, and corresponds to Sec. 49 of the Bankruptcy Act, 1883.

Section 55 of the Act protects all transactions, unless they are in themselves acts of insolvency or fraudulent preferences, entered into with the debtor by third persons for valuable consideration and *bona-fide*, namely *bona-fide* in the sense that the person with whom such transaction takes place had not at the time notice of the presentation of any insolvency petition by or against the debtor, *Bhugwan Das & Co. v. Chutan Lal*, 19 A. L. J. 240: 62 Ind. Cas. 732. Even though the debt vested in the Receiver, the payments in respect of the debt having been made *bona-fide*, *that is without notice of the Insolvency proceedings*, to the insolvent before the date of the order of adjudication are not invalidated. There is no question here of the effect of the insolvency on any execution, nor is there any question of the avoidance of any transfer or preference. The payments being, so far as the defendants are concerned valid, the defendants are discharged from the debt and cannot be made to pay over again to the Receiver. Sec. 55 is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency and its benefit must be given to the defendants in this case. The effect of the application of Sec. 55 in a case like this, that a debt vested in the Receiver may be discharged by the payments made under circumstances specified in that section to the insolvent. *Onkursu v. Bridichand*, 1923 A. I. R. 290 (Nag.)

Good Faith.—Transactions which would be void under sec. 54 as between the creditor and the Receiver can be upheld by any person

making title in good faith, i.e., without notice or without the power of obtaining knowledge of any fraud or fraudulent preference on the part of the bankrupt, *Butcher v. Stead*, 1875, L. R. 7 H. L. 839. Lord Hatherley observed "I think the Legislature intended to say that if you the debtor for the purpose of evading the operation of the Bankruptcy laws and in order to give fraudulent preference make this payment or this charge, it shall be wholly done away with except in cases where the person you have favoured is wholly ignorant of your intention to favour him, and receives payment simply for valuable consideration and *without notice* of any intention on your part to favour one creditor above another."

Scope.—The transactions dealt with in these provisions are those relating solely to the insolvent's property. Thus money paid by a third party to a pressing creditor is not recoverable by the Receiver if it forms part of the insolvent's estate, *Re. Rogers, Ex parte Holland*, 1891, 8 Morr 243.

"Before the date of the order of adjudication."—"The order of adjudication relates back and takes effect under Sec. 28 (7) for the purpose of binding the insolvent and his creditors from the date of the presentation of the petition of insolvency. But it takes effect retrospectively only to the extent laid down in the Act. The question, therefore, is to what extent the Act permits the retrospective operation of the order to bind the rights of the creditors. It is a principle of interpretation that a statute should be construed so as to give a meaning to every word. If the date of the order of adjudication referred to in Sec. 55 (old 38) be deemed to mean the date of the presentation of the petition of insolvency, Sections 34 & 38, now 51 & 55, would become redundant and out of place, for outside Ss. 36 & 37, now 53 & 54, there is no law under which a Receiver can claim the benefit of realisations or payments made, in execution or otherwise, before the application for adjudication was presented." *Achambit Lal v. Chhanga Mal*, 32 Ind. Cas. 429. A sale effected after the order of adjudication is not therefore binding. *In the matter of Jiwandas Jhawar*, 40 Cal. 78: 18 Ind. Cas. 908, *Raghunath Das v. Sundar Das Khetri*, 42 Cal. 72 P. C. 20 C. L. J. 555: 16 Bom. L. R. 814: 24 Ind. Cas. 304. It should be noted that Sec. 55 controls the provisions of Sec. 16. now 28, and by virtue of the provisions of Sec. 55 a debt vested in the Receiver may be discharged by *bona-fide* payment without notice made to the insolvent after the date of the appli-

cation for being adjudged insolvent and before the date of adjudication. *Onkarsa v. Baidichand*, 1923 A. I. R. 290 (Nag.).

Contract.—By a parol agreement between a lender and D. the former agreed to lend D. £2,000 in consideration of the latter's promise to assign certain interests. About a year later in pursuance of this agreement D. assigned those interests to the lender and became bankrupt immediately afterwards. At the time of the assignment no memorandum of the above agreement was in existence but it was recited in the assignment. Held, that the assignment did not constitute a fraudulent preference or a fraudulent conveyance under the Bankruptcy Act and was valid as against the trustee in bankruptcy. *In Re. Davies*, 1921 3 K. B. 628: *In Re. Holland*, 1920, 2 Ch. 360 distinguished.

Transfer after adjudication.—In spite of an order of adjudication being passed against an insolvent, providing on the vesting of his future property in the official Assignee, the insolvent is free to dispose of any property that he might acquire after being declared insolvent, and all persons dealing with him *bona-fide* and for a consideration are discharged from making further payment to the official Assignee, provided the transaction took place before the official Assignee intervened and claimed the property on behalf of the insolvent estate. *Chotte Lal v. Keder Nath*, 84 Ind. Cas. 289. The bankrupt has not the ordinary right if a *Cesti qui trust* to intervene until the surplus has been ascertained to exist and all the creditor's interests and costs have been paid. He cannot trouble the trustee by taxing the bill of costs or interfere with the administration and management of the trustee during the bankruptcy in due course of the execution of his duty, he can demand the surplus—a right which he can dispose by will or deed or otherwise during the pendency of his first bankruptcy, even before the surplus is ascertained, although such disposition will of course be ineffectual unless in the event there is proved to be a surplus upon which it can operate. Moreover, his assignee cannot interfere with the administration of his estate by virtue of such assignment. It would be an assignment of contingent interest which would give no right to the assignee to intervene until it was ascertained whether or not there was a surplus. *Ram Bahudra v. T. V. Nipunji*, (1924) A. I. R. (B). 49.

56 [18] (1) The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a

Appointment of receiver.

receiver for the property of the insolvent, and such property shall thereupon vest in such receiver.

(2) Subject to such conditions as may be prescribed, the Court may—

- (a) require the receiver to give such security as it thinks fit duly to account for what he shall receive in respect of the property; and
- (b) by general or special order, fix the amount to be paid as remuneration for the services of the receiver out of the assets of the insolvent.

(3) Where the Court appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof :

Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove.

(4) Where a receiver appointed under this section—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the balance due from him thereon as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence.

the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him.

(5) *The provisions of this section shall apply, so far as may be, to interim receivers appointed under section 20.*

NOTES.

Review.—This is section 18 of Act III 1907, and is based upon Or. XL. r. 1, C. P. C., 1908. It deals with the appointment of a Receiver to the estate of the insolvent for the realisation of his estate *after the order of adjudication*, as opposed to the appointment of an *interim* Receiver under Sec. 20 *supra*. *Lyon Lord & Co. v. Virbhandas Ratanchand*, 76 Ind. Cas. 380: 1924 A. I. R. (Sind) 69. Sec. 18 (2), now 56 (1), contemplates, on every adjudication of insolvency, an order by the Court appointing receiver for the insolvent's estate, and without such an order the estate does not vest in the Official Receiver under Sec. 19, now 57. Hence a sale of the estate by the Official Receiver without such an order does not give the vendee any title, *Muthuswami Swamiar v. Samoo Kandiar*, 43 Mad. 869: 39 M. L. J. 438, which was distinguished in *Subba Aiyar v. T. S. Ramaswami*, 40 M. L. J. 209: 62 Ind. Cas. 346, where a District Judge to whom an insolvency application was presented transferred it to the "Official Receiver for adjudication and for the administration of the estate." In due course the Official Receiver passed an order of adjudication but there was no order by the District Judge *appointing* the Official Receiver as Receiver in the particular insolvency or vesting the property of the insolvent in him. The Official Receiver however assigned some of the properties of the insolvent to a third person. Held, that the order of the District Judge in effect amounted to an appointment of the Official Receiver for sale of the property of the insolvent, under Sec. 20 (e), now 59 (e), and Sec. 23, now 58, and that the transferee from the Receiver had a valid title. In delivering the judgment their Lordships observed:—"This Court has had an occasion before in the case *Muthuswami Samiar v. Sumoo Kandiar* to regret the deficiency of the Act which does not provide that immediately upon adjudication the estate shall vest in the Official Receiver and we note with regret that that omission has not been rectified in the Amendment Act which has been passed." It should be noted that where an Insolvency Court has not made an order vesting the property of the insolvent in the Receiver, it is not the Receiver but the Court in whom such property vests. But when before an order vesting the property in the Receiver has been made the Receiver purports to sell

the property and the Court subsequently makes an order vesting the property in the Receiver, the vendee's title to the property becomes complete either on the principle of ratification or under Sec. 43 of the T. P. Act. *Narasimulu v. Basava Sankaram*, 1925 A. I. R. (M.) 249: 85 Ind. Cas. 439.

Difference between Interim Receiver and Receiver appointed under this Section.—An *interim* Receiver is appointed for the protection of the estate, *Madhu Sardar v. Khitish Chandra*, 42 Cal. 289, as opposed to the receiver who is appointed after adjudication for the purpose of the realisation of the estate. *Amrita Lal v. Narain Chandra*, 30 C. L. J. 515. Where an *ad interim* receiver has been appointed in insolvency proceedings the receiver appointed after adjudication does not stand in shoes of the *interim Receiver*. He stands on a very much higher footing. The property of the judgment-debtor vests in him, he holds it for the benefit of the whole body of creditors and he has special rights conferred and special duties imposed upon him by statute, *Ramsaran Mandar v. Shiva Prasad*, 58 Ind. Cas. 783. The Receiver referred to in Sec. 52 is Receiver appointed under paragraph (1) of Sec. 56 of the Act after the passing of the order of adjudication and not the *interim* Receiver appointed under Sec. 20 of the Act. *Lyon Lord & Co. v. Virbundas*, 76 Ind. Cas. 380: 1924 A. I. R. (S.) 69.

At any time afterwards.—The mere fact that seven years had passed was not sufficient reason for refusing to appoint a Receiver. *Haramohun v. Mohandas*, 39 C. L. J. 433: 1924 A. I. R. (Cal.) 849.

His Status.—"A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy and the whole of the property of the insolvent is vested in him, and he is the owner of the property until he is discharged. He is an officer of the Court and does not represent either the debtor or the creditor," *Amrit Lal v. Narain Chandra*, 30 C. L. J. 515. "The Receiver is an officer of the Court and the possession of the Receiver is the possession of the Court," *Hunseswar v. Rakhal*, 18 C. W. N. 366. A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of Sec. 2 (17) of the C. P. C. and before an action can be brought against him notice must be served upon him in conformity with the requirements of Sec. 80 of the Code, *Anna Latesia De Silva v. Govind Balavant Parashere*, 22 Bom. L. R. 987: 58 Ind. Cas. 411. The official duties of a Receiver in insolvency

fall within the purview of Sec. 2 (17) of the C. P. Code, and outside the Insolvency Court which appointed him, he is entitled to the protection afforded by Sec. 80 C. P. C. No suit can therefore be instituted against him in respect of any act done by him in his capacity as such public officer without a previous notice of the kind prescribed by Sec. 80 C. P. Code. A sanction granted by the Insolvency Court to file a suit *cannot* be taken as tantamount to a notice to a Receiver within the meaning of Sec. 80 C. P. Code. *Murarilal v. E. B. David*, 84 Ind. Cas. 739: 22 A.L.J. 1116.

Difference between a Receiver in Insolvency and a Receiver in Actions.—"In the present case, the learned Judge of the lower appellate Court seems to have considered that the plaintiff was in contempt in instituting this suit against the Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed. That is obviously a mistake. That rule only applies to cases where the Receiver is appointed in an action and does not apply to a Receiver as mentioned in the Provincial Insolvency Act who is really what is known in the old English Law as an Assignee in bankruptcy." *Amrita v. Narain*, 30 C. L. J. 515.

Duties and Powers of the Receiver.—It is the duty of the Receiver to obey strictly the directions of his appointment and not to act on his own responsibility, and then come to court to sanction what he has done, *Trenchard v. Same*, 1918 L. R. 1 Ch. D. 423. "The duties of the Receiver relate not only to the administration of the estate of the debtor but also to the conduct of the debtor. As regards the conduct of the debtor his duty is to investigate it and report it to the Court whether there is reason to believe that he has committed any offence under the Insolvency Act or any act of bad faith which would justify the Court in refusing or qualifying an order of discharge. As to the debtor's estate it is his plain duty to take control of all the property of the insolvent for the purpose of realisation and distribution amongst the creditors and in general to obtain all information from the bankrupt about his affairs. As soon as possible he must take over all books, deeds, documents and all other property of the bankrupt capable of manual delivery for the purpose of acquiring and retaining possession of the insolvent's property and for the purpose of realising it. He has power of transfer, conveyance and sale subject to the nature of the property. It is necessary that an

order should be made appointing a Receiver even if the Official Receiver is intended to be vested with the powers," *Official Receiver, Trichinopoly v. Somasundaram*, 30 M. L. J. 415:35 Ind. Cas. 602.

The Receiver can take possession of the property of those that have been declared insolvent and not of those who have not been declared insolvent, *Sunnyasi v. Asutosh*, 42 Cal. 225, *Palaniappa v. Official Receiver, Trichionpoly*, 4 L. W. 51: 20 M. L. T. 334: 35 Ind. Cas. 610: 32 M. L. J. 84. A Receiver appointed by the Court is not a judicial officer and has no jurisdiction to make anything in the nature of a judicial enquiry, *Nilmoni v. Durgacharan*, 22 C. W. N. 704: 47 Ind. Cas. 377. The power conferred by this section is intended to enable the Receiver to obtain control of the insolvent's property and not to provide for the determination of the question of title as between the insolvent and third parties, *Maddipoti v. Gandrappu*, 24 M. L. J. 106: 1918 M. W. N. 476: 47 Ind. Cas. 308. For enumeration of the duties and powers of the Receiver vide sec. 59.

What vests in the Receiver.—All moveable and immovable property the insolvent held or was possessed of at the time of the admission of the application vests in the Receiver, Sec. 28 (2). As to what is and what is not the property of the insolvent, *vide* notes under Sec. 28.

Court's Powers.—The Court dealing with the insolvency has jurisdiction to declare a sale in execution of a money decree by a Civil Court invalid and order delivery of possession of property to the Receiver and the Receiver is not bound to institute a suit for that purpose. Sec. 4 of the present Act does not for the first time confer a new power on the Insolvency Court. It is only declaratory of the pre-existing law, *Kochu Muhomed Asan Tharagon v. Sankuralinga Mudaliar*, 40 M. L. J. 219: 62 Ind. Cas. 495. A Court exercising powers under the Provincial Insolvency Act has jurisdiction to enquire whether the property in possession of a third party and alleged by the Receiver to be the property of the insolvent is really so or not and if it finds that it is the property of the insolvent it can order its delivery to the Receiver, *Bansidhar v. Kharagjit*, 37 All. 65. See also *Muhummad v. Munsiram*, 54 P. R. 1917: 132 P. W. R. 1917; *Kundan Lal v. Sadi Ram*, 55 P. R. 1917: 132 P. W. R. 1917, *Dambar Singh v. Munwari*, 15 A. L. J. 877, *Basodi v. Lal Muhummad*, 13

N. L. R. 210; *Jagrup Sahoo v. Ramanand*, 15 A. L. J. 738: 39 All. 633. "When a Receiver has been appointed he becomes an officer of the Court, and if he is about to act in excess of his authority it is competent even to a stranger to bring that fact to the notice of the Court which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officers," *Hanseswar v. Rakhal*, 18 C. W. N. 366. The Court has power to dismiss the Receiver appointed by him. 'The power of appointment carries with it the power of dismissal,' *Itamchandra v. Rakhal* 17 C. W. N. 1045.

Removal of a person in possession.—By Section 56 (3) it is provided that "when the Court appoints a Receiver, it may remove the person, in whose possession or custody any such property as aforesaid is, from the possession or custody thereof."

"Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right to remove."

This section clearly applies to the case of a Receiver applying for the removal of an obstruction from the possession of the property claimed to be the property of the insolvent. It is also clear that for the purpose of determining the right of the receiver as against the obstructor, to the possession of the property, the Court can hold an enquiry under this section. Clause (3) of Sec. 56 is not limited to the case of an application by the Receiver. The terms of the clause are general and there is no reason to restrict the operation of this clause to the application by the Receiver himself. That would virtually be to introduce into the section the words "on the application of the Receiver." 'In our opinion there is no justification for refusing to give to the words of clause (3) of section 56 their natural meaning and for restricting the scope of the clause, *Ramaswami Chettier v. Ramaswami Aiyunger*, 45 Mad. 434: 42 M. L. J. 185: 1922 M. W. N. 110. Where after the appointment of a Receiver for the estate of an insolvent had been made by a District Court some of the properties were sold in auction by a District Munsiff's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication, held, it was competent to the Receiver to make an application to the District Court for annulment of the sale and for

delivery of possession of the properties from the purchasers under Sec. 18 (3), now 56 (3) of the Act. *The Official Receiver Tinnevely v. Sanagaralinga Mudaliar*, 44 Mad. 524. The restrictions of the Court's right to disturb possession under the proviso to Sec. 18 (3), now 56 (3) has reference to cases where owing to the act of the insolvent the property is under a lease for a particular period or is under a usufructuary mortgage or the like, *Kochu Mahomed Asun Tharagon, supra*. Certain creditors moved the Court to direct the Receiver to take possession of a brick kiln which was alleged by them to belong to the insolvent, but which really belonged to the plaintiff. The Court made the order and the Receiver took possession. The plaintiff filed objections which were allowed and possession was restored to him. The creditors applied for review making the same allegation and prayer as before and the Court again passed an order in their favour in compliance with which the Receiver again seized the property. Ultimately the order was set aside on appeal and possession restored to the plaintiff. In a suit by the plaintiff against the said creditors for damages caused by the seizure the defendants raised the plea that they were not legally liable for damages and that proper person to be sued was the Receiver. Held, following *Abdul Rahim v. Sital Prasad*, 41 All. 658, that the defendants were legally liable for the damages. *Binda Prasad v. Ram Chandra*, 19 A. L. J. 277.

Limitations to Insolvency jurisdiction.—Sec. 4, as has been noted, is wide enough to enable an Insolvency Court to adjudicate upon questions of title “which the Court may deem expedient or necessary to decide for the purpose of doing complete justice of making a complete distribution of property in any case of insolvency.” But the power given by this section is subject to the provisions of the Act, one of which is the proviso to Sec. 56 (3) which is in the way of a Court removing any person from the possession of property whom the insolvent has not a present right to remove. Where, therefore, the Insolvency Court, even if it adjudicated upon the title of the insolvent as against the third party, would have no power to recover the property free of obstruction, it is powerless to recover the property from the third person by enforcing its orders. It would therefore be mere waste of time to adjudicate upon questions of title and it would, therefore, be certainly expedient to have these questions decided in a regular suit. *Official Receiver, South Arcot v. Perumal Pillai*, 79 Ind. Cas. 322: 1924 A. I. R. (M.) 387.

Contempt of Court.—Any interference with a Receiver amounts to a contempt of Court, *In Re. Mead*, L. R. 20 Eq. 282, and sec. 50 (6), Bankruptcy Act, 1883. A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of Sec. 2 (17) of the Civil Procedure Code, *Anna Laticia Desilva v. E. V. David*, 1924 A. I. R. 40 (All.). Obstructing a receiver in taking possession of the property of a person against whom insolvency proceedings are pending under the order of the Court is a contempt of Court. The Receiver should not be resisted and the person claiming the property as his by purchase may move the Court against the action of the Receiver, *E. D. Sassoon & Co. v. Musaji Ismailji Lotia*, 9 Ind. Cas. 485. Any treasurer or other officer or any banker, attorney, agent of the bankrupt may pay to the trustee all money and securities in his possession or power as such officer, banker or agent, which he is not entitled by law to retain as against the bankrupt or the trustee. If he does not, he is guilty of contempt of Court. See Sec. 50 (6) of the Bankruptcy Act, 1883. When a Receiver is appointed of property and the property is forcibly taken possession of by any person, not only the person interested in the property but also the Receiver may proceed against such person for contempt. There is nothing to prevent the Receiver from himself applying for a rule for contempt, *Grey v. Ugrumohan*, 28 Cal. 790. A Receiver is an officer of the Court and the Court will therefore see that he performs his functions and will protect the agent appointed under its orders. *Dinonath v. Hogg*, 2 Hay 395. Being such officer his possession is simply the possession of the Court and to such an extent is the case that any attempt to disturb that possession without the leave of the Court is a contempt of Court, *Wilkinson v. Gangadhar*, 6 B. L. R. 486. The mere appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them restraining them from interfering with the possession of the Receiver except by the permission of the Court, *Muhammad Zahiruddin v. Md. Nuruddin*, 21 Cal. 85. The Court will not permit anyone without its sanction and authority to intercept or prevent payment to the Receiver of any property which he has been appointed to receive though it may not be actually in his hands.

Committal for Contempt by the High Court.—The form in which the Court usually enforces its orders in the matter of Receivers is in extreme or aggravated cases by committal to prison, or ordinarily, by

ordering the party in contempt to pay the costs and expenses occasioned by his improper conduct. The High Courts in India being superior Courts of Record possess the power of enforcing obedience to their orders by attachment for contempt, *Hassanbhoy v. Cowasji*, 7 Bom. 1; *Navivahoo v. Narottamdas*, 7 Bom. 5. The power of the High Court to imprison for contempt is irrespective of the Indian Codes, *Surendranath Banerji v. Chief Justice of Bengal*, 10 Cal. 78 P. C., *Martin v. Lawrence*, 4 Cal. 655. The High Court, however, has no jurisdiction to punish as an offence in a summary proceeding conduct in relation to a proceeding in the mofussil Courts as such jurisdiction is not inherited from any of the three abolished Courts—the Supreme Court, the Sudder Dewany and the Sudder Nizamat Adalats, and is not vested in the High Courts by the Charter Act of 1861 or the Letters Patent under that Act, and as such conduct is not contempt of the High Court, and the High Court's power of superintending over the mofussil Courts does not imply any power of protecting those Courts from improper interference. *Governor of Bengal v. Motilal Ghosh*, 41 Cal. 173: 18 C. L. J. 452: 17 C. W. N. 1253.

Power of the District Court to commit for contempt.—In a case from Madras, the District Judge *suo motu* and without any application from the parties issued notice to the defendants to show cause why they should not be committed, and afterwards without any application by the plaintiffs although they took part in the enquiry which led to the commitment, made an order committing the defendants to prison for three months for contempt. In making this order he purported to act as a Court of Record. *Held* that a District Court is not a Court of Record and as such has no inherent power to commit for contempt. The jurisdiction which a District Court has to commit in case of disobedience is conferred by the Codes of Civil Procedure, but the powers conferred by Or. XXXIX r. 2 (3) are only exercisable when the Court is set in motion by a party who deems himself aggrieved. *Kochappa v. Sachi Devi*, 26 Mad. 494.

Power of the Insolvency Court to punish Receivers.—As to the power of the Civil Courts to punish Receivers for acts of disobedience, *vide* C. P. C. Or. XL r. 4. Under Sec. 56 (4) of the Provincial Insolvency Act, V of 1920, the Insolvency Court is specially authorised to attach and sell the property of a Receiver or *interim* Receiver appointed under Sec. 20, when they fail to submit their accounts at

such periods and in such forms as the Court directs, or fail to pay the balance due from them.

Receiver's Remuneration.—If the property that vests in the Receiver is subject to a mortgage or incumbrance, it is only the equity of redemption that vests in the Receiver, and by sale of the property free from encumbrances with the consent of the mortgagee or incumbrancer he pays off the mortgagee or incumbrancer he is not entitled to any remuneration for the full amount realised and paid off to the mortgagee," *Sridhar v. Atmarum*, 7 Bom. 455, *Sridhar v. Krishnaji*, 12 Bom. 272, *Sheoraj Sing v. Gouri Sahai*, 21 All 227, *In Re. Official Assignee's Commission*, 36 Cal. 990. Where any part of the insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution. If the Receiver sells a property free from the mortgage and realises the purchase money the whole of it is not assets available for distribution but only such part as remains in his hand after paying off the mortgagee. He is not entitled to a percentage on the whole of the purchase money. *Govindu v. Abdul Kadir*, 1923 A. I. R. 150 (Nag.). The Court is to determine the Receiver's commission, *Prakas v. E. E. Adlam*, 30 Cal. 696. A Receiver is entitled to a lien for the amount of his commission on the nett assets remaining after payment of all charges, *Mahadeb v. Kuppuswami*, 15 Mad. 233. The right of the Official Assignee to commission does not arise until there are funds in his hands realised and available for distribution among the creditors. If at such time the adjudication is annulled, the right to commission subsists. *Official Assignee v. Ramalinga*, 8 Mad. 79.

Where a Receiver entered into secret agreements with the parties without the agreements being brought to the notice of the Court and where the effect of the agreements was to restrict and control his power as Receiver, held, the parties concerned in making the agreements were guilty of gross contempt of Court for which they were each and all liable to committal, *Manicklal v. Saratkumari*, 22 Cal. 648. The purchase by a receiver in insolvency of property belonging to the insolvent's estate is irregular, and the Court ought not to sanction such a purchase, *Ram Kamal v. Bank of Bengal*, 5 C. W. N. 91.

Costs.—If the Official Assignee brings an unsuccessful motion, however careful he may have been, the order that the Court would make generally would be that he is to pay the respondent's costs and he will have the right of indemnity given him by the previous order

of the Court. Or he may obtain an indemnity from the creditor or other person in whose interest the motion is brought before he starts proceeding. The order for costs should not be directed to the assets in the hands of the Official Assignee when the Respondent is not in any way in default for which he may be partially mulcted in costs, *Re Suresh Chander Gooyee*, 23 C. W. N. 431.

57. [19] (1) The Local Government may ap-
Power to appoint point such persons as it thinks
Official Receivers. fit (to be called "Official Re-
 ceivers") to be receivers under this Act within such
 local limits as it may prescribe.

(2) Where any Official Receiver has been so ap-
 pointed for the local limits of the jurisdiction of
 any Court having jurisdiction under this Act, he
 shall be the receiver for the purpose of every order
 appointing a receiver *or an interim receiver* issued
 by any such Court, unless the Court for special
 reasons otherwise directs.

(3) Any sum payable under clause (b) of *sub-
 section (2) of section 56* in respect of the services of
 an Official Receiver shall be credited to such fund
 as the Local Government may direct.

(4) Every Official Receiver shall receive such
 remuneration out of the said fund or otherwise as
 the Local Government may fix in this behalf, and
 no remuneration whatever beyond that so fixed
 shall be received by the Official Receiver as such.

NOTES.

Review.—This is section 19 of Act III of 1907. "This section leaves the appointment of an Official Receiver entirely in the hands of the Local Government. There will be difficulty in many cases in getting suitable persons to act as Receivers. It may be advisable in some cases and in some circumstances to have Officials to act as Receivers in order that insolvency matters may be thoroughly investigated; so, power has been given to the Local Government to appoint Official Receivers."—*Viceregal Council Proceedings to Act III of 1907.*

Official Receivers.—The mere fact that a person is adjudicated insolvent does not *ipso facto* vest the property of the insolvent in the Official Receiver who may have been appointed by the Local Government under Sec. 19, now 57 of the Act. Before such vesting can take place there must be an order by the Court appointing a Receiver of the estate of the insolvent. In the absence of such an order a sale by an Official Receiver does not convey a good title to the purchaser. *Vythilinga Padaichi v. Ponnuswami*, 41 M. L. J. 78: 62 Ind. Cas. 396. Where an adjudication of insolvency is made by an Official Receiver in the exercise of powers delegated to him under Sec. 52 (1), now Sec. 80, the insolvent's estate does not vest in the Official Receiver under Sec. 18, now Sec. 56, or any other provision and will not so vest unless an order vesting in him is passed by the Court, *Muthuswami Swamjar v. Samoo Kandiar*, 43 Mad. 869: 1920 M. W. N. 537: 39 M. L. J. 438. Besides having the same powers of receivers the Court can delegate to Official Receivers certain powers exercisable by the Court, *Vide* Sec. 80 *infra*. The Official Assignee does not become a Civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent or because persons aggrieved by his decisions can appeal to the Court from those decisions, *Beardsel & Co. v. Abdul Gunni*, 37 Mad. 137. Where the Official Receiver, on the application of the mortgagee sold certain properties, which were subject to mortgage, it was held that he was not entitled to charge a commission out of the insolvent's estate on the full value of the properties sold, but only on the amount coming to the insolvent's estate, *In Re. Official Assignee's Commission*, 36 Cal. 990.

Vesting Order must be Express.—The Official Receiver does not get a right to deal with the properties of the insolvent without an *express* vesting order of the District Judge. Where, when the insolvency petition was filed by the insolvent in the District Court, the District Judge made an endorsement on that petition that it was transferred to the Official Receiver for disposal, held that the wording of the order itself does not convey the idea of any vesting at all. Where the sales were made by a person who was not authorised to sell and were thus invalid, held that it is impossible to hold that the limitation under Sec. 65 will apply as Sec. 68 presupposes that the decision is by a Receiver properly appointed. *Sankara Rao v. Turlapati Ramakrishnaiah*, 1924 (M.) 461: 46 M. L. J. 184

His Removal.—A Court under the Provincial Insolvency Act has power to review its orders and can remove for sufficient reason the Official Receiver already appointed by it to administer an insolvent estate, and appoint a Special Receiver. *The Official Receiver, Tanjore v. Nataraja Sastrigul*, 46 Mad. 405: 44 M. L. J. 251. In view of this ruling Rule 12 of the Madras High Court is *ultra vires*. The Courts' power to interfere with a sale held by an Official Receiver is not limited to cases where there has been some *mala fides* on the part of the Receiver or the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors. Reliance is placed in the case of *Ex parte Lloyd: Re. Peters*, (1882) 46 L. T. 64, where the Master of the Rolls observed "the Court would not interfere unless the trustee did that which was so utterly unreasonable and absurd that no reasonable man would so act." The same objection was taken in *Thiruvengkatachariar v. Thangia Ammal*, 39 Mad. 479, and overruled. It was there observed "it (*Ex parte Lloyd, Re. Peters*) is not an authority for the proposition that where proper reasons are given by Court for holding that action of a Receiver was irregular and has prejudiced the general interest of the creditors, it should not set aside the order passed by the Receiver." We adopt these observations in dealing with the present case where the Receiver's act was certainly irregular and prejudicial to the creditors in accepting a lower bid at the second sale. *Rumbadia Chetty v. V. Ramaswami Chetty*, 44 M. L. J. 284.

58. [23] Where no receiver is appointed, the Court shall have all the rights of and may exercise all the powers conferred on, a receiver under this Act.

NOTES.

Review.—This is section 23 of Act III of 1907.

Where a Court acts under Sec. 23, now 58, it exercises the function of a Court and does not act in the character of a Receiver. Where a Court acting under the provisions of the Provincial Insolvency Act, resells the property of an insolvent owing to the failure of the auction purchaser to complete the deposit of the purchase money and at the resale the price realised falls short of the price for which it was originally knocked down, the Court has power to call on the defaulting auction-

purchaser to pay the amount of the difference and to recover such amount under Or. XXI. r. 71 C. P. C. *Manak Chand v. Ibrahim*, 17 N. L. R. 49: 62 Ind. Cas. 307.

In cases of summary administration under sec. 74 and also in cases in which there are very little assets of the insolvent to be taken charge of and realised the Court may not appoint a Receiver as mentioned in sec. 59. Where there is no Receiver the property of the insolvent vests in the Court, *Gobind Das v. Karam Sing*, 40 All. 197: 16 A. L. J. 32, *Gobinda v. Gopal*, 9 N. L. R. 182.

Is Receiver a necessary party in a mortgage suit?—The meaning of Sec. 28(6) viz. "that nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed" would be quite clear when read with this section. The question that arose in *Jagannath Marwari v. Kalachand Banerji*, 41 C. L. J. 290, was whether the mortgagee was bound to make the Receiver a necessary party in his suit to enforce the mortgage bond, and it was held that a secured creditor may enforce his security in the same manner as if Sec. 28 of the Insolvency Act had not at all been enacted, and this is so, even with regard to the question of parties to the suit. It was contended that in a mortgage suit all persons having an interest in the equity of redemption must be made parties, and as the right of the insolvent vested in the Receiver under Sec. 28, he was a necessary party. Under the present section the interest of the insolvent vests in the Court where no Receiver is appointed. Can it be said that the mortgagee was bound to sue the Court in order to enforce his mortgage? That would be clearly absurd.

May.—It is in the discretion of the Court either to take upon itself the administration of the insolvent's property or to administer it by appointing a Receiver. And the Court has power to appoint a Receiver either at the time of the order of adjudication or at any time afterwards. *Haramohan v. Mohandas*, 39 C. L. J. 433: 1924 A. I. R. (Cal.) 849.

59. [20] Subject to the provisions of this Act, the receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among
Duties and powers of receiver.

the creditors entitled thereto, and for that purpose may—

- (a) sell all or any part of the property of the insolvent;
- (b) give receipts for any money received by him;

and may, by leave of the Court, do all or any of the following things, namely :—

- (c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same;
- (d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent;
- (e) employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court;
- (f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time subject to such stipulations as to security and otherwise as the Court thinks fit;
- (g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts;
- (h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon; and
- (i) divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

NOTES.

Vide Notes under Sec. 56 *infra*.

Review.—This is section 20 of Act III of 1907, and is based upon Or. XL. of the C. P. C. 1908. The powers conferred by this section on the Receiver are far wider than those conferred under Or. XL. of the C. P. C. 1908. Though it was found necessary for the purpose of insolvency to invest the Receiver with wide powers it was found at the same time necessary to provide a check for his extravagance. Hence the provision for “leave of the Court.”

The Official Assignee does not become a Civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent or because persons aggrieved by his orders have a right of appeal to the Court, *W. A. Beardsel & Co. v. Nilagiri*, 11 M. L. T. 391. A Receiver is not a judicial officer and has no jurisdiction to make anything in the nature of a judicial enquiry. A glance at the list of the duties and powers of a Receiver given in Sec. 59 will show that judicial functions are wholly foreign to his position in relation to the insolvent's estate. *Nilmoni v. Durga Chakran*, 22 C. W. N. 704. In *Sant Prasad Singh v. Sheo Dut Singh*, 2 Pat. 704. Mst. Anup Koer on behalf of her minor sons filed a petition claiming that three-fourths of the property should be exonerated from the liability. The District Judge thereupon called upon the Receiver to report on the objections filed by Mst. Anup Koer. The Receiver took evidence and came to the conclusion that her contention was right. The District Judge without considering the matter at all accepted the report of the Receiver and exonerated the share of the minor children from sale. *Held* that “it is always desirable that a contention of this nature should be decided by the Court and not by an officer that may be appointed by the Court. The question raised on behalf of the minors was a question of paramount title and therefore a question raising a very important matter between the insolvent and the general body of creditors. It was necessary that the District Judge should have himself disposed of the matter.”

Difference between a Receiver and an Official Receiver.—An Official Receiver appointed under Sec. 57 exercises such judicial or *quasi judicial* powers as may be conferred upon him by Rules framed by the High Court under Sec. 80. But in the case of an ordinary Receiver his duties and powers are defined by Sec. 59, and they are executive in their character and not judicial. *Nilmoni v. Durgacharan*, 22 C. W. N. 704.

Clause (a).—The purchaser of property belonging to the insolvent cannot impugn the sale on the ground that the Receiver who sold the property entered into an arrangement with the purchaser for deferred payment of the purchase money without leave of the Court. The Indian Contract Act has no application to sales by officers of the Court, *Shu-Wa v. Sullivan*, 15 Ind. Cas. 368. The question of selling the property of the insolvent is within the discretion of the Receiver, *Arman Sardar v. Satkhira Jt. Stock Co., Ltd.*, 18 C. L. J. 564. The Official Assignee has full power to sell the property and effects of the insolvent and it is his duty to sell the property and effects of the insolvent and it is his duty to sell the same with all convenient speed, *Woonwalla & Co. v. N. C. Macleod*, 30 Bom. 515: 8 Bom. L. R. 470. The sanction of the Court to such a contract is necessary, *Ibid.* The Court's power to interfere with a sale held by an Official Receiver is not limited to cases where there has been some *mala fides* on the part of the Receiver or the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors. *Rambadia Chetty v. Ramaswami Chetty*, 44 M. L., J. 284.

Clause (e).—"What the priest did for the pilgrims could not appropriately be described as business within the meaning of section 20 (c), now 59 (c), and the exercise of his calling by the insolvent cannot be called a trade under sec. 40, now 66," *Ananda v. Ganesh*, 40 Cal. 678: 21 Ind. Cas. 969. The Receiver may carry on the business of the insolvent not with a view to profits but only so far as may be necessary for the beneficial winding up of the same, Sec. 57 (1) Bankruptcy Act, 1883.

Limitation to Powers of the Court.—"The Court in the exercise of its insolvency jurisdiction has no summary powers of realising debts due to the insolvent. The powers of the Court for this purpose are the same as those of the Receiver (sec. 23, now 58), and the powers of a Receiver are defined in Sec. 20, now 59. The power to order an alleged debtor of the insolvent to deposit the amount of the debt in Court or to pay up is not one of those powers. The Court has no power to enquire into and judicially determine the existence of the amount of the debt. It is in this respect merely managing the estate of the insolvent. It has power to enquire into claims against the estate, not into claims by or on behalf of the estate," *Gobinda v. Gopal*, 9 N. L. B. 183. The Court, on an objection being made by persons who are no parties to the suit claiming the properties to be theirs and in their pos-

session is bound by clause (2) of r. 1. Or. XL. C. P. C. to come to a definite finding as to the truth of these allegations before it can make an order directing the Receiver to take possession of the properties. Such allegations in the petition cannot be disposed of on the ground of discrepancy between theirs and the contents of earlier petition and filed by one of the petitioners and others. It is not the duty of the Receiver of a property to enquire into the claims of title made by third parties and the Court has no power under the Code to delegate an enquiry on the point to the Receiver. *Hamida Rahaman v. Jamila Khatun*, 34 C. L. J. 123.

Leave of the Court.—In all matters of importance the Receiver should apply for and obtain the direction of the Court, *Balaji v. Ramchandra*, 19 Bom. 660. Sales by Receiver under the direction of Court must be treated as sales by the Court, *Minatunnessa v. Khatunnessa*, 21 Cal. 479. In *Muhammad Umar v. Munshi Ram*, 54 P. R. 1917: 132 P. W. R. 1917, it has been held that "the permission to sue the Receiver that had appointed him was necessary, it being immaterial whether the Receiver be appointed by the Court under the provisions of the C. P. C. or under the Insolvency Act." Held further that the leave of the Insolvency Court that had appointed the Receiver was not a condition precedent to the institution of the suit against him who under the circumstances should have been allowed reasonable time to apply to the Insolvency Court for the said leave."

Absence of Leave if Valid Defence.—The obtaining of leave is a matter between the Receiver and the Court and the fact that the leave of the Insolvency Court has not been obtained is not a valid defence which a defendant can raise to a suit by the Official Receiver. In *Re Branson*, 1914, 2 K. B. 701, *Official Receiver, Coimbatore v. D. D. Kanga*, 14 L. W. 655: 1921 M. W. N. 858.

Difference between a Receiver in Action and a Receiver in Insolvency.—In *Amritalal v. Narain Chandra*, 30 C. L. J. 515, held, "the rule that a suit should not be instituted against a Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed only applies to cases where the Receiver is appointed in an action and does not apply to a receiver as mentioned in the Provincial Insolvency Act, who is really what is known in the old English law as an assignee in bankruptcy." This view has also been followed in *Sant Prasad Singh v. Shew Dut Singh*, I. L. R. 2 Patna 724, where it has been held that it is not necessary to obtain the leave of the Court to proceed against a

Receiver appointed under the provisions of the Provincial Insolvency Act. But according to the case of *Anna Latesia De Silva v. Govind Balvant Parshore*, 22 Bom. L. R. 987: 58 Ind. Cas. 411, he, being a Public Officer within the meaning of Sec. 2 (17) of the C. P. C., is entitled to a notice before an action can be brought against him. There is no statutory provision under which leave is necessary to file a suit against Official Receiver. On the other hand, whatever provision there is in the Act relating to the grant of such leave is confined to creditors. Vide Sec. 28 (2). The utmost that can be said is that an Official Receiver is a public officer within sec. 2, cl. 17 (d) of C. P. C. and notice under sec. 80 is necessary before filing a suit against him, *Mt. Maharana Kunwar v. E. V. David*, 1924, A. I. R. 40 (All.),

The Reasons for the above distinction.—Sulaiman, J., in delivering the judgment in *Mt. Maharana Kunwar v. E. V. David*, 1924, A. I. R. 40 (All.), observes, “A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate *does not vest* in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody; after leave he represents the real beneficiary. A Receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under sec. 28 (2) the insolvent's estate *vests in him*....He alone, and no one else, represents the estate. He therefore is the proper party to be impleaded in the action. *No leave is accordingly necessary for suing him.*”

Clause (d).—After the vesting order is made by the Court the Receiver alone is competent to sue, *Sadodin v. W. Spiers*, 3 Bom. 437. A Court may authorise a Receiver to sue in his own name and a Receiver who is authorised to sue though not expressly in his own name may do so by virtue of his appointment. *Jagat Tarini v. Nabogopal*, 34 Cal. 305: 5 C. L. J. 270, *Fink v. Maharaj*, 25 Cal. 642: 2 C. W. N. 469. A Receiver cannot be party to a suit without the leave of the Court, *Pramatha v. Khetra*, 32 Cal. 270. Where a Receiver appointed by the Court institutes civil proceedings and is replaced by another subsequently it is necessary that the new Receiver should be made a party to these proceedings, *Akla v. Delhi*, 28 Mad. 157. An interim Receiver cannot be made a party, *In Re. Hunt*, 1 B. H. C. R. 251. The power of the Receiver to sue with or without the leave of the Court depends upon the terms of his appointment. If there is no authority given in his writ of appointment to sue the suit will be

dismissed, *Drabamoyee v. Davies*, 14 Cal. 323. where the order appointing him a Receiver gives him power to let and sell the immovable property to take and use all such lawful and equitable means and remedies for recovering, realising and obtaining payment of the rents as shall be expedient, held that under the terms of such an order the Receiver had power to sue to eject without obtaining permission of the Court, *Haridas Kundu v. J. C. McGregor*, 18 Cal. 477. A Receiver cannot entrust or delegate his duties to another, *Balaji v. Ramchandra*, 19 Bom. 660.

Lis Pendens.—A Receiver in insolvency is not affected by the doctrine of *lis pendens* and a party seeking to bind him by the result of the suit must apply to have him joined as a party to the suit. A decree for sale obtained by an unpaid vendor against his insolvent vendee subsequent to the order of adjudication without making the Receiver party in the suit, is a nullity, so is the sale under the decree; and the purchaser at such a sale acquires no title against the Assignee. *Mokshagunam Subramia v. S. V. Ramkrishna*, 70 Ind. Cas. 357. But in *Jagannath Murwari v. Kalachand Banerji*, 41 C. L. J. 290 it was held that a secured creditor may enforce his security as if Sec. 28 had not at all been enacted, and this is so, even with regard to the parties to the suit. It was contended that in a mortgage suit all persons having an interest in the equity of redemption must be made parties and as the right of the insolvent vested in the Receiver under Sec. 28 (2), he was a necessary party. This contention was regarded to be unsound. Under Sec. 58 the interest of the insolvent vests in the Court where no Receiver is appointed. Can it be said that the mortgagee was bound to sue the Court in order to enforce the mortgage? That would be clearly absurd. The reasonable construction therefore is that a secured creditor is not in any way affected by the other provisions of Sec. 28, and for the purpose of enforcing the mortgage it should be held that the title to the property remained with the mortgagor.

Is permission necessary to sue a Receiver.—There is no statutory authority for the proposition that a person who is suing a Receiver appointed under the Prov. Insolvency Act has to obtain the permission of the Insolvency Court. A Receiver appointed under C. P. C. merely holds the estate on behalf of the Court. The estate does not vest in him. Nor does he in any way represent it and leave of the Court is necessary in order that by impleading him the estate may be bound. Without leave of the Court he represents nobody; after leave he represents the real beneficiary. A Receiver under the Prov. Insolvency

Act holds a different capacity altogether. He is more than a mere Officer of the Court. Under Sec. 28(2) of the Act *the insolvent's estate vests in him*. He alone and no one else represents the estate. He therefore is the party to be impleaded in the action. No leave is accordingly necessary for suing him. The utmost that can be said is that a Receiver is a "Public Officer" within the meaning of Sec. 2 (17) d of the C. P. Code, and a notice under Sec. 80 C. P. C. is necessary. *Maharana Kunwar v. E. B. David*, 77 Ind. Cas. 57: 1924 A. I. R., (All.), 40, *Murarilal v. E. B. David*, 22 A. L. J. 1116 also lays down that where a suit is instituted without previous notice having been given to a Receiver and he does not take the plea of want of notice but raises it at a later state he does not waive his right to raise such a plea, and the suit must be dismissed for want of such a notice.

Sales by the Receiver.—Sales by the Receiver in whom the property of the insolvent vests under Sec. 18, now 56, are really sales by the owner, and may be held either by public auction or by private treaty. The procedure for sales in execution of decrees under C. P. C. does not apply to them, *Entazuddi v. Ramkrishna*, 24 C. W. N. 1072. The provisions of the C. P. Code do not apply to sales of an insolvent's property by the Receiver under Sec. 59 of the Provincial Insolvency Act, *Mulchand v. Murarilal*, 36 All. 2: 11 A. L. J. 979: 21 Ind. Cas. 762; *Husaini v. Md. Zamir Abedi*, 74 Ind. Cas. 802.

Occupancy holdings.—Whether the occupancy holdings are saleable or not without the consent of the *raiyat* has now been concluded by the decision of a Special Bench in the case of *Chandra Binode v. Sheikh Ali Baksh*, 24 C. W. N. 818 F. B., in which it was held, that apart from custom or local usage the transfer for value of an occupancy holding, in whole or in part, is operative against the *raiyat* whether it is made voluntarily or involuntarily, but such transfer is not effective against his landlord without his consent.

Breach of Contract.—The right to claim damages for injury to the bankrupt's credit and reputation does not pass to the trustee in bankruptcy but remains *in the bankrupt*, and he is competent to maintain an action for the recovery of damages, *Wilson v. United Counties bank, Ltd.*, 1920 L. R. App. Cas. 102. In *Bekham v. Drake*, 2 M. L. C. 579, Earle J. observed 'the right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property. Thus it has been laid down that the assignees cannot sue for breach of promise of

marriage, for criminal conversation, seduction, *defamation, battery, injury to the person by negligence*, as by not carrying safely, not curing, not saving from imprisonment by process of law."

60. [21] (1) In any local area in which a declaration has been made under section 68 of the *Code of Civil Procedure*, 1908, and is in force, no sale of immoveable property paying revenue to the Government or held or let for agricultural purposes shall be made by the receiver; but, after the other property of the insolvent has been realised, the Court shall ascertain—

- Special provisions in regard to immoveable property.
- (a) the amount required to satisfy the debts proved under this Act after deducting the monies already received;
 - (b) the immoveable property of the insolvent remaining unsold; and
 - (c) the incumbrances (if any) existing thereon; and shall forward a statement to the Collector containing the particulars aforesaid; and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by *paragraphs 2 to 10 of the Third Schedule* to the said Code as he thinks fit, and subject to the provisions of those *paragraphs* so far as they are applicable, and shall hold at the disposal of the Court all sums that may come to his hands by the exercise of such powers.

(2) Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immoveable property; and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order.

NOTES.

Review.—This is section 21 of Act III of 1907, and is intended to afford protection to the agriculturists as contemplated by sec. 68 of the C. P. C. 1908.

Sale of Revenue paying property.—Where an immovable property belonging to an insolvent whose claim however to it was in dispute was sold by the Receiver for a low price, held that sale was void either under Sec. 60 Prov. Insolvency Act or under Sec. 6 of the T. P. Act, *Nazir Hossain v. Matin-uz-zaman*, 1925. A. I. R. (Oudh) 299.

“Held or let for agricultural purposes.”—Agricultural purposes must be for the purpose of cultivating soil. Where the main object of occupation is the dwelling house and where the cultivation of the soil, if any, was entirely subordinate thereto, held, the land was not used for agricultural purposes, *Kali Kissen v. Janki*, 8 W. R. 250. Cultivation of indigo is an agricultural purpose, but not manufacture of indigo cakes, *Surendra v. Hari Mohan*, 31 Cal. 174. Lands for the cultivation of potatoes, gram, vegetables, are lands for agricultural purposes, *King Emperor v. Alexander*, 25 Mad. 627: 12 M. L. J. 393. But see *Umrao Bibi v. Syad Mahomed*, 27 Cal. 205: 4 C. W. N. 76, where it was held that growing vegetables and *sonesunda* is not an agricultural purpose. So planting bamboo, mangoe trees, is not an agricultural purpose, *Summon Gope v. Raghubir*, 24 Cal. 160. A lease for the cultivation of coffee is an agricultural lease. *Murugesu v. Chinanthabai*, 24 Mad. 421.

The Punjab.—“The first clause of Sec. 21 (now 60), is not applicable to the Punjab and the second clause of that section does not require that the Receiver or the Court should proceed through the Collector. The underlying principle of the law of insolvency is that an insolvent shall be freed from his indebtedness and shall obtain a discharge within a reasonable period, and the Court or a Receiver proceeding under the Insolvency Act, should proceed as far as possible on the same lines as a Court acting in execution of decrees. In execution of decrees against the land of indebted members of an agricultural tribe it has always been the practice that the debt should be liquidated by a farm terminable after a reasonable period, and the maximum period for which a farm has been permitted is twenty years. By the arrangement of such a farm or a mortgage, which is automatically redeemed by the profits, the debt is automatically extinguished. Ordinarily, different or harsher measures should not be taken against

a person, who becomes an insolvent under the provisions of the law."

Manji v. Giridari Lal, 2 Lah. 78: 61 Ind. Cas. 674.

For the procedure to be followed by the Collector, *vide* the 3rd schedule of the C. P. C. 1908.

In *Parbati v. Rajah Shiamrikh*, 44 All. 296 following the Full Bench case of *Kalka Das v. Gajju Singh*, 43 All. 510, a judgment-debtor against whom were outstanding decrees of a Revenue Court for rent, being adjudicated insolvent, the decree-holder sought to execute his decrees and was met by an objection that the property against which execution was sought had been transferred by the insolvent judgment-debtor to his wife and minor son. The decree-holder, thereupon, with the leave of the Insolvency Court brought a suit for a declaration that the transfers made by the insolvent were collusive and sham transactions and that the properties should be declared to have vested in the Receiver. *Held* that in as much as the Provincial Insolvency Act did not apply to proceedings in the Revenue Courts the suit was misconceived and not maintainable.

Distribution of Property.

61 [33] (1) In the distribution of the property of the insolvent, there shall be paid in priority to all other debts—

Priority of debts.

(a) all debts due to the Crown or to any local authority; and

(b) all salary or wages, not exceeding twenty rupees in all, of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition.

(2) The debts specified in sub-section (1) shall rank equally between themselves, and shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Subject to the retention of such sums as may be necessary for the expenses of administra-

tion or otherwise, the debts specified in sub-section (1) shall be discharged forthwith in so far as the property of the insolvent is sufficient to meet them.

(4) In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

(5) Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference.

(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts entered in the schedule.

NOTES.

Review.—This is section 33 of Act III of 1907, and is based on Sec. 40 (4) of the Bankruptcy Act, 1883. The introduction of this section in Act III of 1907 was thus explained in the *Notes on Clauses* to that Act: "The list of preferential payments enumerated in Sec. 356 of the C. P. C. 1882 while including Crown debts gives no priority to the wages of service or labour rendered to the insolvent. On the other hand, the invariable preference given to mortgages over unsecured liabilities is not expedient. It is proposed therefore to adopt the principle accepted in Sec. 40 of the Statute of 1883 as supplemented by Sec. 1 of the Preferential Payments in Bankruptcy Act, 1888."

"Crown Debts."—*In Re. Henley and Co.*, (1878) L. R. 9 Ch. D. 469, James L. J., held that whenever the right of the Crown and the right of the subject with respect to the payment of a debt of equal

degree came into competition, the Crown right prevails. It was held that the Crown having a right of distress could proceed to distress and it was therefore right that the Crown debt should be paid in priority to other creditors. Cotton L. J. held that the right existed even when Crown submitted to come in under the administration of the assets in the winding up of the company. A distinction has always been drawn between a bankruptcy and winding up in as much as in the former the whole of the property is divested from the former, i.e., the company and passes to the Trustee and becomes his property, while in the case of winding-up there is no such divestment. *In Rex v. Wells*, 1812, 16 East 278 "the incontrovertible rule of law that where the King's and subject's title concur the king's shall be preferred, has been established."

Crown debts and mortgages.—In English mortgages the ownership is wholly transferred to the creditor which is, however, liable to be divested by the re-payment of the loan on the appointed day. The mortgagees have the right to enter upon the possession of the property immediately upon the execution of the deed but the possession of the mortgagor is protected by a covenant for quiet enjoyment till default. The mortgagor has only the right to redeem. The mortgagee is not obliged to apply for sale of the property mortgaged. He has no debt provable in the insolvency until his security has been valued or realised. It stands outside bankruptcy. Crown is therefore not entitled to priority over the immoveable property so mortgaged, *Dost Muhammad Khan v. Manick*, 29 All 537, *Ebrahim Khan v. Rangswami Naicker*, 28 Mad. 420. The second mortgagee has a right to redeem. The ownership of the property passes to the first mortgagee and he is therefore not entitled to priority over the Crown, *Bank of Upper India v. Administrator General, Bengal* 45 Cal. 653: 22 C. W. N. 793.

Local authority.—"The expression local authority shall mean a Municipal Committee, District Board, body of Port Commissioners, or other authority legally entitled to or entrusted by the Government with the control or management of municipal or local funds,"—Sec. 3 (28) of the *General Clauses Act, X of 1897*..

Clerk or servant.—Occasional clerks or servants are not entitled to the benefit of priority, *Espartero Waller*, L. R. 15 Eq. 412, *Cairney v. Back*, 1906, 2 K. B. 746.

Labourer.—"The expression labourer denotes persons who earn their daily bread by personal manual labour or in occupations which

require little or no art or skill or previous education." *J. Chand v. Aba*, 5 Bom. 132. Thus a person employed to spin cotton in a spinning mill is a labourer.

Partners.—Insolvency of a single partner dissolves the partnership business and after adjudication order has been passed against one of the partners of the firm a person holding a decree against the firm cannot proceed to attach the property of the firm because by allowing the execution the solvent partners abandon their rights of administering the joint estate and in the interests of the joint creditors the decree holder must be restrained from going on with the execution, *Sudarmal v. Aranvyal*, 21 Bom. 205.

Non-scheduled debts.—The Official Assignee distributed the assets of the insolvent after deducting commission, &c., to the two scheduled creditors though he had notice of claim by three other creditors, and their claims were neither admitted nor rejected. *Held*, that the Official Assignee was personally liable for the amount, of which the three creditors had been deprived. *Re. Archibald Gilchrist Peace*, 26 C. W. N. 653.

Landlord and Tenant.—By virtue of the provisions contained in Sec. 101 of the Oudh Rent Act a landlord is a secured creditor of his tenant for his rent, and when the tenant becomes insolvent, the landlord is entitled to be paid the rent due to him out of the proceeds of the sale of the crops of the insolvent before distribution is made among other creditors. *Bishambher Nath v. Rukha* 81 Ind. Cas. 647.

Interest.—Where an insolvent's estate is sufficient to pay off the creditors in full leaving a balance in the hands of the Official Assignee the Court will direct interest at 6 per cent. to be paid on such proved or admitted contract debts as expressly or impliedly carry interest from the date in which the insolvency petition was filed, *In Re. Mahomed Shah*, 13 Cal. 66. See also *In Re Thomas Periera*, 1 M. H. C.

62. [39 (1) (2)] (1) In the calculation of dividends, the receiver shall retain in his hands sufficient assets to meet—

Calculation of dividends.

(a) debts provable under this Act, and appearing, from the insolvent's state-

ments or otherwise, to be due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs.

- (b) debts provable under this Act, the subject of claims not yet determined;
 - (c) disputed proofs or claims; and
 - (d) the expenses necessary for the administration of the estate or otherwise.
- (2) Subject to provisions of sub-section (1), all money in hand shall be distributed as dividends.

NOTES.

Review.—This is section 39 (1) (2) of Act III of 1907, and is based upon sec. 66 of the Bankruptcy Act, 1883.

This section makes provision for the payment of the dues of creditors who have not or who could not file proof of their debts in time. The Receiver before making any distribution of dividends must keep apart in deposit with him sufficient sum to meet the claims of such creditors. There is no provision for disposal of a dividend which has not been claimed as was the case under sec. 44 of the Indian Insolvency Act. Where after the admission by the trustee of the creditor's proof against a bankrupt's estate and that creditor's participation in a first dividend, it was ascertained that he had proved for and received more than he was entitled to and upon an application to the Court his proof was reduced, held that in the absence of any rule in bankruptcy, the well-known principle of equity, that a beneficiary who has been overpaid is not entitled to receive any further payment out of the common fund, until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary, was applicable, with the result that the overpaid creditor was not entitled to participate in any future dividends in respect of his reduced proof without giving credit for the overpayment in respect of his original proof. In *Re. Searle, Hoare & Co.*, (1924) 2 Ch. D. 325.

63. [39 (3)] Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid, out of any money for the time being in the hands of the receiver, and dividend or dividends which he may have failed to receive before that money is applied to the payment of any future dividends; but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

Right of creditor who has not proved debt before declaration of a dividend.

NOTES.

Review.—This is sec. 39(3) of Act III of 1907. In *Ajudhyanath v. Anantdas* 3 All. 799, the creditor of an insolvent who had assigned all his property to trustees for the benefit of all his creditors generally, sued him for his debt, joining the trustees as defendants, on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that the plaintiffs had not applied for its registration within the time notified by them. *Held*, that in as much as the plaintiff had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it. Also in *Re. Cobbold*, 36 Cal. 512, the High Court allowed the claim of a creditor to be scheduled, in appeal.

64. [39 (4)] When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership, he shall declare a final dividend; but before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified but not proved, that if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application by any such claimant, grants him further time for establishing his

Final dividend.

claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons.

NOTES.

This is sec. 39 (4) of Act III of 1907 and under sec. 39 (4) a of Act III of 1907 the particular form of notice to creditors whose claims have been notified but not proved is prescribed whenever a final dividend is to be declared. In Madras the Rules under the Insolvency Act require a separate registered letter addressed to each creditor, and when a notice of that sort is prescribed by the Rules made under the statute a strict compliance with the Rules is necessary before the creditor's claim to share in the final dividend can be disallowed. Where a final dividend has been declared without giving the required notice to a creditor, the right of proof is not affected by mere laches on his part in not furnishing proof earlier, and he should be allowed to reopen the matter and given an opportunity of proving his debt within a time to be fixed by the Court. *Venkatanarayana Chetty v. Seengun Chetty*, 47 Mad. 916: 47 M. L. J. 240: 80 Ind. Cas. 620: 1924 A. I. R. (M.) 769.

65. [39 (5)] No suit for a dividend shall lie against the receiver; but where the receiver refuses to pay any dividend, the Court may, on the application of any creditor who is entered in the schedule, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application.

NOTES.

Review.—This is section 39 (5) of Act III of 1907. Although under this section no suit lies against the order of a Receiver refusing payment of dividend the remedy of a creditor lies in moving the Court in the first instance, and then if necessary to move the High Court against the order of the Judge by way of appeal, by leave of the District Court or of the High Court, *vide* sec. 75 (3) *infra*. If the Receiver appears to have withheld the payment without any reason—

able cause the Court may order him to pay thereon interest out of his own money.

66. [40] (1) The Court may appoint the insolvent himself to superintend the management of the property of the insolvent or of any part thereof, or to carry on the trade (if any) of the insolvent for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the Court may direct.

(2) The Court may from time to time, make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, or in consideration of his services if he is engaged in winding up his estate; but any such allowance may, at any time, be varied or determined by the Court.

NOTES.

Review.—This is section 40 of Act III of 1907, based on Sec. 64 (1) (2) of the Bankruptcy Act, 1883. By this section it is intended to invest the Court with authority to allow an insolvent to manage his business for beneficially winding it up giving the insolvent such allowances for the maintenance of himself and his family as the Court thinks fit and proper.

"Trade"—See Notes under Sec. 42 *supra*. "What the priest did for the pilgrims could not appropriately be described as *business* within the meaning of Sec. (c), now 59 (c). And the exercise of this calling by the insolvent under Sec. 40 (1), now 66, could not be deemed a *trade*," *Ananda v. Ganesh*, 40 Cal. 678. The term business is wider in its application than the term trade. An isolated business transaction is trade when he has an intention of gaining and continuing to gain his livelihood by it, *Ex parte Board of Trade, Re. Moulton*, 1890, 8 Morr. 7. In *Goswami Giridhari v. Govardhanlalji*, 18 Bom. 294 P. C. Lord Morris observed, that the expression "carry on business" is a very elastic one and almost incapable of definition so that the tribunal must in each case look to the particular circumstances. In

that case the question arose whether the high priest of a shrine who received personal offerings in money from his followers could be said to carry on business. The question was answered in the negative and it was with reference to such offerings that the Judicial Committee observed that the phrase *carry on business* was intended to relate to business in which a man might contract debts and ought to be liable to be sued by persons who had business transactions with him." *Maharajah Manindra Chandra v. Chandi Chorani*, 24 C. W. N 582.

The title of the Official Assignee to the subsequently acquired property of the insolvent is subject to two qualifications; (1) when the insolvent has acquired property subject to lien and obligations: in such a case the property taken is subject to equities and charges which affect it in the hands of the insolvent, and (2) when the insolvent carries on a trade at subsequent period with the assent of the Assignee and the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade in priority to the claim of the Assignee, *Moses Kerokoose v. Benjamin Brookes*, 8 M. I. A. 339: 4 W. R. 61: 1 Suth P. C. J. 426.

Maintenance.—In making an appropriation of income for the benefit of creditors the Court acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for the insolvent's proper maintenance according to his condition in life. The Statute law in this country fixes the amount by Sec. 60 C. P. C. read with Sec. 16 (2) now 28 (2) of the Provincial Insolvency Act. The Court acting under Sec. 40 (2) now 66 (2) cannot allow more than half the insolvent's salary for the maintenance of himself and his family, *Tulsi Lal v. Girsham*, 38 Ind. Cas. 410.

Such allowance as it may think just.—Is the amount of the insolvent's allowance irrevocably fixed by Sec. 60 C. P. C. In *Radha Mohan v. M. C. Whyte*, 45 All 364: 21 A. L. J. 216: 73 Ind. Cas. 413: 1923 A. I. R. 466 (All.), Walsh J. fully discussed this question and answered it in the negative. "There is no doubt that in the case of a person in India in receipt of a salary the maximum which is divisible amongst the creditors is half. That maximum is fixed by statute. Sec. 28 makes the whole of the property of the insolvent on adjudication divisible amongst the creditors, but excepts by subsection 5 from the property so divisible any property which is exempted by the C. P. C. from attachment. Sec. 60 C. P. C. exempts half

the salary from attachment. The combined operation therefore of Sec. 28 (5) of the P. I. Act and 60 (1) 3 the C. P. C. is to make half his salary divisible among the creditors. The creditors in the appeal contend that this amount is not only the maximum but the minimum. . . . The difficulty of accepting this is that Sec. 66 (2) provides that the Court "may from time to time make such allowance as it may think just" to the insolvent. If both the maximum and minimum are fixed by statute this position is nugatory and might as well be struck out of the Act. If the section is intended to fetter the discretion of the Insolvency Court in the case of a man who is earning his money by salary and his half salary was already protected by the operation of Sec. 60 C. P. C. the Legislature ought to have said so. The argument really invites us to legislate rather than to interpret. . . . We hold that the law in India is precisely the same as in England on this matter. Indeed historically it is correct to say that the sub-section in question, viz., Sec. 66 (2) is taken directly from the English legislation on the subject, and that the Insolvency Courts in this country, inspite of the fact that they cannot attach the half salary which is removed from the grasp of the creditors by Sec. 60 C. P. C. have *an absolute discretion to make a further reasonable allowance appropriate to the condition and the circumstances of the insolvent out of the remaining half which is otherwise divisible amongst the creditors.*"

67. [41] The insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act, and of the expenses of the proceedings taken thereunder.

Right of insolvent to surplus.

NOTES.

Review.—This is section 41 of Act III of 1907 and Sec. 65 of the Bankruptcy Act, 1883. Any surplus remaining after payment in full of all the debts with such interest as is payable on them and the costs and charges and expenses of the insolvency belongs to the insolvent.

A debtor against whom a receiving order had been made, paid money into Court to satisfy his debts in full. The receiving order was then rescinded by an order which directed the Official Receiver after paying the debts and deducting his costs, charges and expenses to pay the balance in his hands to the debtor. A subsequent unsatis-

fied judgment-creditor applied to the Registrar in bankruptcy for a charging order upon the balance of the fund in the hands of the Official Receiver. Held, that the Registrar had jurisdiction to make the order. *In Re. Prior*, 1921 3 K. B. 333.

Surplus.—An insolvent can assign any prospective surplus that may remain over after his estate has been fully administered in insolvency. Such assignment is of a contingent interest and does not give the assignee the right to intervene until it is ascertained whether or not there is a surplus. *Ramchandra Narayan v. P. V. Nipunge*, 25 Bom. L. R. 499: 73 Ind. Cas. 379: 1924 A. I. R. (Bom.) 49,

Appeal to Court against receiver.

68. [22] If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of; and make such order as it thinks just:

(Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of.

NOTES.

Review.—This is section 22 of Act III of 1907, and corresponds to sec. 90 of the Bankruptcy Act, 1883.

Court's Power over Receiver.—"When a receiver has been appointed he becomes an Officer of the Court, and if he is about to act in excess of his authority, it is competent even to a stranger to bring that fact to the notice of the Court which has inherent power to review the conduct of the Receiver and to make an appropriate order so that the stranger may not be prejudiced by an unlawful act of its own officer: and for this purpose the Court may hold a summary enquiry. This view is in accord with that taken in the case of *Ex parte Cochrane*, L. R. 20 Eq. 282, *Searle v. Choat*, 25 Ch. D. 773, and *In Re. Rasul Huzi Cassum*, 13 Bom. L. R. 13. *Hanseshur v. Rakhal*, 18 C. W. N. 366. The Court's power to interfere with a sale held by an Official Receiver is not limited to cases where there has

been some *mala fides* on the part of the Receiver or the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors. *Rambarda Chetty v. Ramaswami Chetty*, 44 M. J. J. 284: 73 Ind. Cas. 375.

Application of the Section.—Even though an appeal lies to the District Judge under Section 68 against any act or decision of the Official Receiver, a mere refusal of the Official Receiver to take action under Sections 53 and 54 cannot be deemed to be an “Act” of the Receiver under Section 68 against which a creditor is competent to prefer an appeal to the District Judge; but the creditor can move the Court on refusal by the Official Receiver to take action under the Act, or prefer an appeal against the order of the District Judge, if the creditor indemnifies the Official Receiver against costs in the event of failure in such proceedings. *Ananhanarayana v. Sankaranarayana*, 47 Mad. 673: 79 Ind. Cas. 395: 1924 A. I. R. (Mad.) 345.

Scope of the Court's enquiry.—This section does not require the Court to hold an enquiry. The section does not contemplate that a lengthy enquiry should be held as if the matter was a regular claim for specific performance. Under this section the Court simply ratifies, reverses, or modifies, the executive acts of its officers. *Raman Chetty v. A. V. P. Firm*, 31 Ind. Cas. 884. Where an application under Sec. 68 is made to the Insolvency Court it is the duty of the Court to entertain it and after hearing the evidence tendered on behalf of the applicant on the one hand and on behalf of the Receiver on the other to decide the issues raised both of fact and law. *Pitaram v. Jujhar Sing*, 39 All 626. Sec. 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it, but *it is not the only remedy open to him*. If a person applies under Sec. 68, he is subject to the time limit prescribed therein, but if he wants to enforce his claim in the Civil Courts in the ordinary way, his rights will be those of an ordinary person. It is open to a third person whose property had been taken possession of by a Receiver and who does not claim title through the insolvent, to treat the Receiver as a trespasser and maintain his claim in a Civil Court. There is no provision in the Provincial Insolvency Act other than that contained in Sec. 4, which in any way takes away the jurisdiction of a Civil Court to try such a suit. *Maharana Kunwar v. E. B. David*, 77 Ind. Cas. 57: 1924 A. I. R. (All) 40.

Duties of the Receiver under this Section.—A Hindu father was adjudicated insolvent and when the Official Receiver proceeded to sell

the joint family property. The insolvent's son objected that the share of the insolvent alone should be sold and not the entire family property. *Held*, that it was the duty of the Official Receiver to adjudicate upon the question raised before bringing the properties to sale, and that an order merely notifying to the buyers the son's claim without deciding it was extremely irregular. *Panja Ram v. Gurraju*, 18 L. W. 282: 76 Ind. Cas. 877: 1924 A. I. R. (Mad.) 147.

Estoppel.—Where a person fails to appeal to the Court against an order of the Receiver, it is not open to him afterwards to raise the question at a subsequent stage of the insolvency proceedings whatever may be his rights in a separate regular proceeding. *Panja Ram v. Gurraju*, 18 L. W. 282: 76 Ind. Cas. 877: 1924 A. I. R. (Mad.) 147.

Res Judicata.—There seems to be a conflict of authority as to whether a person aggrieved by an order of the Insolvency Court can bring a regular suit *after* an adverse decision of the Insolvency Court. The trend of authority is in favour of the view that where the aggrieved person elects to have his remedy from the Insolvency Court the order of the Insolvency Court would be final and binding and operate as *res judicata*, and he cannot litigate the matter over again—in a regular suit. An adjudication of the Insolvency Court under Sec. 22, now 68, would bar a subsequent suit in the Civil Court for the same relief because, (1) the adjudication amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely against him but absolutely, within the meaning of Sec. 41 of the Evidence Act, (2) the application heard and disposed of by the Insolvency Court is a suit within the meaning of Sec. 11 of the C. P. C., so that the adjudication would operate as *res judicata*, (3) upon the general principles of law apart from Sec. 11 of the C. P. C., a litigant who has voluntarily elected to submit to the decision of one out of two alternative Courts which are open to him cannot turn round after an adverse decision and litigate the same matter again," *Pitaran v. Jujhar Singh*, 15 A. L. J. 661: 33 Ind. Cas. 793. "A third party who is not a creditor claiming property adversely to the insolvent is not affected by the special provision of Sec. 16 (2) of the Provincial Insolvency Act; he can consequently maintain a suit against the Official Receiver in a Civil Court without obtaining previous leave of the Insolvency Court; such a suit is not barred by Sec. 22, now 68. It is always dangerous for Indian Courts to apply English common law rule of procedure unless such rule has been expressly adopted," *Musumut. Halima v. Muthura Das*, 10 S. L. R. 179: 40 Ind. Cas.

122. The decision of the Insolvency Court against an objection claiming property attached by the Receiver in insolvency is conclusive and no suit will lie as it is precluded by Sec. 4. *Burra Begum v. Babu Sheo Narain* 1923 A. I. R. 293 (All.) Under the New Act if a question of title has been actually raised by a stranger to the insolvency and decided by the Insolvency Court the decision is final, and the question cannot be reopened in a separate regular suit. This however does not mean that exclusive jurisdiction has been conferred on the Insolvency Court and that the only remedy open to the aggrieved stranger is to apply to that Court. Where a person has made no attempt to bring the matter up before the Insolvency Court and there is no order of the Insolvency Court which can be pointed out as amounting to a decision within the meaning of Sec. 4 (2) he is at perfect liberty to have recourse to the ordinary Civil Courts. *Mt. Maharana Kanwar v. E. V. David*, 1924 A. I. R. 40 (All.): 77 Ind. Cas. 57.

May.—The word ‘may’ in Sec. 68 does not mean ‘must’. Sec. 68 provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him. It is open to a third person who does not claim title through the insolvent to treat the Receiver as a trespasser and maintain his claim in a Civil Court. *Mt. Maharana Kanwar v. E. V. David*, 1924 A. I. R. 40 (All.): 77 Ind. Cas. 57.

But where the application though purporting to be made under this section was not made within the time prescribed, held that the person claiming as his own property which was advertised by the Receiver as the property of the insolvent is not precluded from suing for a declaration of title thereto by reason of his having made an application with the same object in Insolvency Court. *Kundan Lal v. Kham Chand*, 44 All. 620; *Pitaram v. Jujjhar Singh*, 39 All. 626, distinguished.

Contrary View.—But a contrary view has been taken in *Harman v. Ganpat*, 73 Ind. Cas. 367 in which it was held that where an Insolvency Court disallows the claims of a person to property attached and sold as the property of the insolvent, a regular suit to establish his right to the property is maintainable. So also in *Raman Chetty v. A. V. P. Firm*, 31 Ind. Cas. it was held that an order under this section does not preclude a party from pursuing an ordinary civil remedy. Also in *Sunchi Khan v. Karam Chand*, 73 Ind. Cas. 705, it was held “the only question is whether the plaintiff having sought his remedy in the Insolvency Court and having been unsuccessful there

is competent to bring a suit for possession. The Courts below have relied on some rulings of the Allahabad High Court which are against the plaintiff, but the matter is settled so far as the Lahore High Court is concerned by *Duni Chand v. Muhammad Hossain*, 40 Ind. Cas. 770 : 22 P. R. 1917 : 14 P. W. R. 1917, in which it was held that a person who claims a right to property taken possession of by the Official Receiver as belonging to an insolvent and whose claim had been disallowed by the Insolvency Court may bring a regular suit to establish his rights.

"Person aggrieved."—Means 'a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something; it is not sufficient that he has lost something which he could have obtained if another order had been passed.' *Ex parte Sidebotham*, 1880, 14 Ch. D. 458. Any person who makes an application to the Court for a decision or any other person who is brought before the Court to submit to a decision is, if the decision goes against him thereby, a person aggrieved by that decision, *Ketaki v. Saratkumari*, 20 C. W. N. 995. A creditor who is entitled to a decision in respect of sale of the property of the insolvent is a person aggrieved, *Tiruvengkatachariar v. Thangiamal*, 39 Mad. 479. Where a Receiver in insolvency at the instance of a creditor attaches and takes possession of a property as the property of the insolvent, a third person claiming to be the owner of the property is a person aggrieved, *Charu Chandra v. Hem Chandra*, 47 Ind. Cas. 72, *Mulchand v. Murarilal*, 36 All 8. An Official Assignee can appeal when he is an aggrieved person, *Official Assignee v. Ramchandra*, 33 Mad. 134. An assignee by deed of the property of an insolvent may be an "aggrieved person," *Haji Jackeria v. Selha*, 12 Bom. L. R. 27. A decision by an Official Receiver that a certain debt is due by the insolvent is appealable under this section, as such decision would aggrieve the insolvent. *Anandji Damodar v. James Finlay & Co.*, 62 Ind. Cas. 441.

Persons not aggrieved.—A mortgagee is not a person aggrieved, *Hanseswar v. Rakhal*, 18 C. W. N. 366 : 18 C. L. J. 359 : 20 Ind. Cas. 683. A creditor has no *locus standi* in an application against the estate of an insolvent by a third person claiming adversely. The Receiver is the only person competent to take such action as he thinks fit and proper and the creditor has no right of appeal, *Jhabba Lal v. Shib Chunder*, 39 All 152. An insolvent is not a person aggrieved,

Shakwat Ali v. Radhamohan, 41 All 243: 17 A. L. J. 299: 49 Ind. Cas. 816.

Election of remedies.—A stranger to insolvency proceedings may at his option seek his redress in the ordinary Civil Court when aggrieved by an act of the Official Receiver or he may apply under Sec. 68 of the P. I. Act; but if he takes the latter course, he must comply with the terms of the section. *Bhairo Pershad v. S. P. C. Das*, 17 A. L. J. 787: 51 Ind. Cas. 113, *Husaini v. Muhammad Zamir Abedi*, 74 Ind. Cas. 802: 1924 A. I. R. (Oudh.) 294. Under Sec. 4 (2) of the present Act any question of title or priority of law or fact that may be decided by the Insolvency Court will be binding for all purposes as between on the one hand the debtor and the debtor's estate and on the other hand all claimants against him or it and all persons claiming through or under them or any of them. Therefore the decision in *Hukumat Rai v. Padam Narain*, 39 All 353, that the judgment of the Insolvency Court is not *res judicata* is no longer good law. A suit is barred by the previous order of the Insolvency Court, *Irshad Hussain v. Gopinath*, 41 All. 378: 49 Ind. Cas. 590: 17 A. L. J. 374. Ordinarily the party feeling aggrieved by the conduct of the Receiver should seek redress against him in the very proceedings in which he was appointed, *Kamatchi v. Sundaram Aiyar*, 26 Mad. 492, *Pramatha v. Khettra*, 32 Cal. 2709 C. W. N. 247. A stranger has the ordinary right to seek redress for trespass committed whether by the Receiver or by anybody else in the ordinary Civil Court and is not bound to apply to the Insolvency Court. But if he does so apply under Sec. 22, now 68, he must comply with the terms of the section and if he obtains a decision in the matter the decision is final, *Bhairo Pershad v. S. P. C. Das*, 17 A. L. J. 787: 1 U. P. L. R. 18: 51 Ind. Cas. 113. See also *Mt. Maharana Kanwar v. E. V. David*, 1924 A. I. R. 40 (All.).

Official Receiver.—The conduct of an Official Receiver in any particular respect may be brought to the notice of the Court by any person with a view of having the Receiver's act or decision in any particular matter reversed or modified, it is not merely the insolvent or the creditors or any aggrieved person who can take action in this respect, *Dataram v. Deoki Nandan*, 58 Ind. Cas. 6.

Limitation.—A District Court has no jurisdiction to entertain an application under Or. XXI r. 90 to annul a contract of sale completed by a Receiver unless made within 21 days as prescribed by this section, *Avanashi v. Muthulkruppam*, 34 M. L. J. 319: 1918 M. W. N. 345:

44 Ind. Cas. 885. If the application is not under Sec. 22 then it is not subject to the limitations prescribed, *Hanseswra v. Rakkhal*, *supra*. In computing the period of limitation, *viz.*, 21 days, the principle that an application under Sec. 22, now 68, does not fall within the scope of Sec. 5 of the Limitation Act as held in *Thakur Pershad v. Punna Lal*, 35 All 410, and also the principle that the time for taking copies of the Receiver's order cannot be excluded as held in *M. Devaswami v. Munakshisundara*, 16 M. L. T. 246 and in *Sivar myya v. Ishujanga*, 39 Mad. 596, can no longer hold good in view of Sec. 78, *infra*.

Exception to the proviso.—A Court has inherent power to rectify errors or mistakes of a Receiver or to reverse or modify his acts or decisions. In such a case the time-limit prescribed by Sec. 22, now 68, would be no bar to action being taken by the Court, *Dataram v. Deokinandun*, 58 Ind. Cas. 6. Where the sales were made by a person who was not authorised to sell and were thus invalid, held that it is impossible to hold that the limitation under Sec. 68 will apply as Sec. 68 presupposes that the decision is by a Receiver *properly appointed*. *Sankara Rao v. Turlapati*, 1924 A. I. R. (Mad.) 461.

Appeal.—An appeal lies against an order passed by a Subordinate Court under Sec. 68 to the District; and by a District Court to the High Court, with the leave either of the High Court or of the District Court.

PART IV.

PENALTIES.

69 [New] *If a debtor. whether before or after the making of an order of adjudication,—*
Offences by debtors.

- (a) *wilfully fails to perform the duties imposed on him by section 22 or to deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or under his control to the Court or to*

any person authorised by the Court to take possession of it, or

(b) fraudulently with intent to conceal the state of his affairs or to defeat the objects of this Act,

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of any document relating to such of his affairs as are subject to investigation under this Act, or

(ii) has kept or caused to be kept false books, or

(iii) has made false entries in or withheld entries from or wilfully altered or falsified any document relating to such of his affairs as are subject to investigation under this Act, or

(c) fraudulently with intent to diminish the sum to be divided among his creditors or to give an undue preference to any of his creditors,—

(i) has discharged or concealed any debt due to or from him, or

(ii) has made away with, charged, mortgaged or concealed any part of his property of any kind whatsoever,

he shall be punishable on conviction by the Court with imprisonment which may extend to one year.

NOTES.

Review.—This is based on section 43 of Act III of 1907 and Sec. 24 of the Bankruptcy Act, 1883. The amendments introduced in this section are thus explained in the *Statement of Objects and Reasons*:—

“Proceedings instituted against fraudulent insolvents are frequently infructuous. This is largely due to the lack of precision in the Act as to the procedure to be adopted by the Court which desires to

take action. The wording of sub-section (2) of section 43 is unduly vague, regard being had to the fact that it constitutes a criminal offence, and experience has shewn that it frequently creates difficulties. It is proposed that the penal provisions of existing section 43 should be amended on the lines of section 103 of the Presidency Towns Insolvency Act, and that the procedure to be followed on a charge should be defined on the lines of section 104 of that Act. It is proposed to embody these provisions in the two separate sections 43A and 43B inserted by clause 16 of the Bill, which also inserts a new section 43 C containing provisions similar to those of section 105 of the Presidency Towns Insolvency Act. It seems desirable to make it clear that a dishonest insolvent who has been guilty of an offence under the Act can be proceeded against even after he has obtained his discharge or after a composition submitted by him has been accepted."

Scope.—"The section provides a punishment by way of penalty and before an insolvent can be punished under this section he must be shown by legal evidence to have committed on some specific occasion one or other of the offences enumerated in this section. A law of this kind, the intention of which is to punish *should be administered as criminal law is administered*, i.e., specific offences should be charged, not technically specific in the sense of a specific term of indictment but the Court, the insolvent, and all concerned should know what offences the insolvent is being tried for, and the evidence should be directed to the proof of that offence so that the accused may be in a position to adduce evidence to rebut the charge of that offence, and the Judge must specifically find what offence the insolvent is guilty of," *Rash Behari v. Bhagwan Chandra*, 17 Cal. 209. "Proceeding against a debtor under section 43 (2) now 69, is in the nature of a criminal proceeding and as in all criminal cases, it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence, and everything should be strictly and accurately pursued and if on any of these 3 points a substantial defect should appear it would be a ground for reversing conviction," *Harihar v. Maheswar*, 18 C. W. N. 692, *Amirudi v. Jadar*, 19 C. L. J. 430 (27 Bom. 399 referred to). "Proceedings under sec. 43 (2) should not be based merely upon evidence given on behalf of the creditor when opposing the application of a debtor to be adjudged insolvent; but evidence as to specific acts alleged against the debtor should be recorded *de. novo*." *Nathumul v. District Judge of Benares*, 32 All 547: 7 A. L. J. 732: 6 Ind. Cas. 870. *Nand Kishore v. Suraj Mal*,

37 All 426, *Ngachock v. M. Pura*, 1914 U. B. R. 1: 24 Ind. Cas. 767, *Nawab v. Topan Ram*, 62 P. W. R. 1916: 35 Ind. 494.

Who can take action.—The Receiver is an officer of the Court and when he has good grounds to believe that an enquiry should be made into the conduct of the insolvent the Court can authorise him to ascertain facts and to report them to it with a view to the adoption of such steps as may be necessary in the interests of justice, *Mon-Mohon v. Hemanta*, 23 C. L. J. 553. A creditor has no right of appeal as he is not a person aggrieved, *Yyappa v. Munick Ansari*, 40 Mad. 630, *Digendra v. Ramani*, 22 C. W. N. 958; 48 Ind. Cas. 333, *Palianappa v. Subramaniam*, 54 Ind. Cas. 740: (1920) M. W. N. 135, *Virchand v. Bulakidas*, 55 Ind. Cas. 717.

Clause (a).—The Insolvency Court has power to direct the insolvent to appear for his examination touching his estate and effects and dealings, and it is his duty to appear for the examination, although he may reside more than 200 miles away from the court house, *In Re. Cowasji Polkerji*, 13 Bom. 114 See also *In Re. Ganeshdas Pandalar*, 32 Bom. 198, *In Re. Naoroji Sarabji*, 33 Bom. 462.

Exceptions.—"By virtue of Sec. 4 of the Provident Fund Act neither the Receiver nor the creditor of an insolvent has any right to money drawn by the insolvent from the compulsory deposits in a Railway Provident Fund. There can therefore be no fraudulent dealing in respect of such money, such as is made punishable by Sec. 69 (a)" *Nagindas Bhukhandas v. Ghelabhai Gulabdas*, 44 Bom. 673: 22 Bom. L.R. 322: 56 Ind. 450 Similarly property held in trust by the insolvent, the contingent interest of a reversioner to succeed after the death of a Hindu widow, agricultural holdings, political pensions need not be set forth in the schedule of assets, and the withholding of these properties and the others mentioned in the Notes under Sec. 28 does not constitute an offence punishable under this section.

Clause (b).—Where an insolvent is charged with purposely withholding documents it is the duty of the prosecution to establish that such books did in fact exist. Mere suspicion cannot be allowed to pose as proof, *J. M. Lucas v. Official Assignee, Bengal*, 24 C. W. N. 418: 56 Ind. Cas. 577.

Omission to enter properties in schedule.—Where an insolvent not knowing or forgetting that an equity of redemption is a valuable asset failed to show in his schedule of assets certain land belonging to him but mortgaged with possession to two of his creditors, held that he is not guilty of any offence under this section, *Wadhawa Sing v.*

Emperor, 16 Cr. L. J. 272: 44 Ind. Cas. 128. Entries in the inventory must be wilfully false, and an entry made by a *bona fide* mistake or unintentional inaccuracies do not come under this section, *Sukrit Narain v. Raghunath*, 7 All 445, *Karim Bulksh v. Misri Lal*, 7 All 295.

Clause (c).—In order to constitute the offence of undue preference under Sec. 69 (c) the payment must be to a creditor and not to an “alleged creditor” i.e., a creditor who was not admitted as such by the Official Assignee. Where an insolvent transfers property and the question is whether in so doing he acted in good faith, the fact that there was valuable consideration for the transfer adequate to the occasion would negative the inference that there was an absence of good faith inspite of the fact that the transfer was in favour of a relative, *J. M. Lucas v. Official Assignee, Bengal*, 24 C. W. N. 418: 56 Ind. Cas. 577.

Concealment of property. Clause (c) (II).—In *Quasim Ali v. Emperor*, 43 All 407: 19 A. L. J. 378: 64 Ind. Cas. 37, Piggott & Walsh JJ. held that “a man in the position of an insolvent who has the means of ascertaining where property of his has been disposed of, even if he has been actually a party to the making away with it, and who does not use the means, is just as guilty of concealment within the meaning of this section as if he actively concealed the locality in which the property actually was.....Unfortunately there seems to be no provision in the Provincial Insolvency Act as there is in the English Act enabling the Receiver to call the sons before him and to compel to answer questions on oath as to the disposition of their father's property.” “It is a very serious offence and District Judges must realise that it ought to be visited with severity when discovered.”

Bad faith.—It has been laid down as a general principle (*Udai-chand v. Ramkumar*, 15 C. W. N. 213: 12 C. L. J. 400, *Samiruddin v. Kadumoyee*, 15 C. W. N. 244, *Chatrapat Sing v. Kharaysing*, 21 C. W. N. 497, &c) that whether the debtor has or has not committed acts of bad faith is not to be determined by the Court at the preliminary stage when the order of adjudication has to be made, but has to be enquired into only at the final stage when the application is made for an order of discharge. Hence it is argued that the question of bad faith specified in sec. 43 now 69, cannot be gone into by the Insolvency Court at any time previous to the passing of the

order of final discharge and the Insolvency Court has no jurisdiction to take proceedings under this section *before* considering the application for final discharge. On the authority of the cases cited above and on the basis of the observations of Jenkins C. J. in *J. M. Lucas v. Official Assignee, Bengal*, 24 C. W. N. 418, to the effect that "though no invariable rule can be laid down, it is ordinarily undesirable to institute criminal proceedings until determination of civil proceedings in which the same issues are involved" it is argued that the question of bad faith specified in Sec. 43, now Sec. 69, cannot be gone into by the Insolvency Court at any time previous to the passing of the order for final discharge, and that the Insolvency Court has no jurisdiction to take proceedings under this section before considering the application for final discharge. This argument is based on a misapprehension of the different scopes of Ss. 24 and 69 of the Act, corresponding to Ss. 14 and 43 of Act III of 1907. The above cases lay down that for the purpose of adjudication questions of bad faith are not at all necessary to be enquired into. This does not show that the Court is not competent to institute criminal proceedings against the insolvent for acts of bad faith under sec. 43 (2), now 69, at any time before the final discharge and it has been held in *Nanki Mal v. Emperor, through Raghbir Pershad*, 17 O. C. 138: 25 Ind. Cas. 363, that "the Court is quite competent to take cognisance of any act of bad faith at any time whether before or after the order of adjudication under sec. 43 of Act III of 1907 although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved." It has been held also in *Ram Behari Lal v. Jugannath*, 19 O. C. 89 that "a Court is not bound to defer taking action and awarding punishment when necessary, in respect of acts and omissions mentioned in sec. 43 of Act III of 1907 until the insolvent applies for an order of discharge." Held also in *Ubkobin v. District Court*, 3 U. B. R. 1918, 97: 49 Ind. Cas. 55 that "the terms of sec. 43 are clear and the Court's power under that section can at any time be put in motion by a creditor and the Court is then bound to consider whether the debtor has made false entries or lists or committed any other act of bad faith. *It is not necessary that the Court should wait till the debtor makes an application for discharge.*"

Prosecution.—"Prosecution may be either under the general Act, Ss. 421 & 424 of the I. P. C. or under Sec. 43 of Act III of 1907. When a special enactment such as the Provincial Insolvency Act, Sec. 43, deals with an offence similar to the offence which is dealt

with by a general enactment such as the Indian Penal Code Ss. 421 & 424, it does not follow that the provisions of the general enactment are repealed to that extent. The prosecution may be under either of these enactments provided by Sec. 26 of the General Clauses Act," *Sigubulah v. Ramasamiah*, 6 L. W. 283: 42 Ind. Cas. 608. The offences dealt with under Sec. 43 (2) are in the nature of disciplinary offences, i.e., offences committed by the insolvent in the nature of breaches of duty to the Court and not offences against the general criminal law," *Ladu Ram v. Mahabir Pershad*, 39 All 171: 37 Ind. Cas. 996.

Appeal.—A Receiver of an insolvent estate is not an aggrieved party and is not entitled to appeal against an order refusing to take action under Sec. 43, now Sec. 69 of the Act. *Bhagwant Kishore v. Sanwal Das*, 19 A. L. J. 701: 61 Ind. Cas. 802. No appeal lies against an order of a District Judge refusing to take action against an insolvent under Sec. 43, now Sec. 69, nor is such an order open to revision, *Gujar Shah v. Barkat Ali Shah*, 56 Ind. Cas. 744. On an appeal from a sentence of imprisonment under this section the appellate court has power under Or. XII, r. 51 of the C. P. C. read with Sec. 5 (2) of the Act, to suspend the sentence until the appeal is disposed of, *Nagindas Bhukhandas v. Ghelabai Gulabdas*, 56 Ind. Cas. 449. Where an insolvent called upon to produce his books, give inventory of his properties &c., fails to produce them and an application by a creditor under Sec. 43, now Sec. 69, for action to be taken against the insolvent is dismissed, held that there is no appeal at the instance of the creditor. The provisions contained in Sec. 43, now 69, are of disciplinary character and that person, if any, who is really aggrieved by reason of the default of the insolvent is the Court to which proper assistance has not been rendered by the debtor and not any person who sets the Court in motion, *Palaneappa v. Subramaniam*, (1920) M. W. N. 135: 54 Ind. Cas. 740.

A creditor is not a "person aggrieved" by a final order passed after enquiry by the Court under Sec. 69 of the Act. But when the application of the creditor is dismissed without enquiry without receiving any report from the Receiver and without stating any reasons except that the creditor is not interested in making the application, the creditor is a person aggrieved by the order and can prefer an appeal against it to the High Court. *Karuthan Chettiar v. Raman Chetty*, 79 Ind. Cas. 340.

70. [New] (1) *Where the Court is satisfied that there is ground for inquiring into any offence referred to in section 69, the Court shall direct that a notice be served on the debtor in the manner prescribed in the Code of Criminal Procedure, 1898, for service of a summons, calling on him to show cause why a charge or charges should not be framed against him.*

(2) *The notice shall set forth the substance of the offence, and any number of offences may be set forth in the same notice.*

(3) *At the hearing of such notice and of any charge framed in pursuance thereof, the Court shall, so far as may be, follow the procedure for the trial of warrant cases by Magistrates prescribed by Chapter XXI of the Code of Criminal Procedure, 1898, and nothing in Chapter XXIII of the said Code relating to trials before High Courts and Courts of Session shall be applicable to such trial.*

(4) *Any number of offences under this section may be charged at the same time:*

Provided that no debtor shall be sentenced to imprisonment exceeding an aggregate period of two years for offences under this section committed in the course of the same insolvency proceeding.

(5) *The Court may, instead of itself inquiring into an offence under section 69 make a complaint thereof in writing to the nearest Magistrate of the first class having jurisdiction and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898:*

Provided that it shall not be necessary to examine the complainant.

NOTES.

Review.—This section is new* and lays down the procedure to be followed in trying cases under Sec. 69.

The Charge.—When the charge framed against an insolvent does not correspond to the notice issued to him his conviction thereunder cannot stand. It is the duty of the prosecution to prove the offences with which the insolvent is charged and mere suspicion cannot be allowed to pose as proof, *J. M. Lucas v. Official Assignee, Bengal*, 24 C. W. N. 418: 56 Ind. 577. An offence mentioned in Sec. 103 of the Presidency Towns Insolvency Act, corresponding to Sec. 69 of the present Act, may be committed by an insolvent either before or after adjudication of insolvency and the section not only applies to cases of destruction of an insolvent's books before they were produced before the official Assignee but also to cases of destruction in the Official Assignee's office after they have been taken possession of by the Court. The rule that a charge under section 69 cannot be maintained if the charge is not framed in pursuance of a notice under Sec. 70 is subject to the principle that no error or irregularity in a charge will call for a reversal of an order unless it has occasioned a failure of justice, and in deciding whether this is the case the Court shall have regard to the fact whether the objections could have and should have been raised at an earlier stage of the proceeding, *Joseph Perry v. Official Assignee, Calcutta*, 24 C. W. N. 425: 31 C. L. J. 209: 56 Ind. Cas. 778,

A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where as an Insolvency Judge on the application of a creditor, he allows the prosecution to proceed. *Srikrishna v. Emperor*, 1923 A. I. R. 193 (All.).

71. [New] *Where an insolvent has been guilty of any of the offences specified in section 69, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.*

Criminal liability after discharge or composition.

NOTES.

Review.—This section is new, and is taken from the Bankruptcy Act, 1883, Section 167. Cf. Sec. 105 Presidency Towns Insolvency Act.

72. [53] (1) An undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Where the Court has reason to believe that an undischarged insolvent has committed the offence referred to in sub-section (1), the Court, after making any preliminary inquiry that may be necessary, may send the case for trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance before such Magistrate; and may bind over any person to appear and give evidence on such trial.

NOTES.

Review.—This is section 53 of Act III of 1907, corresponding to section 31 of the Bankruptcy Act, 1883, and Sec. 155 a (1) of the Bankruptcy Act, 1914. The provision by its express terms imposes an absolute obligation upon an undischarged bankrupt who obtains credits to give information regarding his position. The object of the section is to protect the person from whom the bankrupt seeks to obtain credit. That person is not protected unless disclosure is actually made by him of the fact that the person obtaining the credit is an undischarged bankrupt. It is not enough that the undischarged bankrupt should show that he sought through an agent to give the information, and that he believed on reasonable grounds that it had been given. The disclosure must be made in fact to the person giving the credit, and if the credit be obtained without disclosure having in fact been made to that person, then, whatever may have been the state of mind of the undischarged bankrupt, the offence is committed. *The King v. Edward Fitzgerald, Duke of Leinster* (1924) 1 K. B. 311.

In order to convict an insolvent against whom an adjudication has been made, but who has not been discharged, it is not necessary to show any intent on his part to defraud on obtaining credit, *Reg. v. Dyson* (1894), 2 Q. B. 176.

Forum.—A charge of obtaining goods on credit by an undischarged insolvent by false representations is triable by the Court having jurisdiction where the goods were obtained, and not necessarily where the false representations were made, *Reg. v. Ellis*, 1898, 19 Cox C. C. 210.

73. [New] (1) *Where a debtor is adjudged or re-adjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—*

Disqualification of insolvent.

(a) *being appointed or acting as a Magistrate;*

(b) *being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached; and*

(c) *being elected or sitting or voting as member of any local authority.*

(2) *The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if—*

(a) *the order of adjudication is annulled under section 35, or*

(b) *he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part.*

(3) *The Court may grant or refuse such certificate as it thinks fit, but any order of refusal shall be subject to appeal.*

NOTES.

Review.—This section is new, and is based upon sections 42 & 9 of the Bankruptcy Acts, 1883 & 1890, respectively. The reasons for the enactment of this new section are explained thus: "Under the Indian

law no statutory disabilities attach to the position of an undischarged insolvent. It is doubtful whether public opinion in this country is at present inclined to attach much disgrace to a person of this position, but it appears desirable that the sense of the community should be stimulated by proving certain statutory disqualifications in addition to those already imposed, *e.g.*, by the Regulations relating to members of the Legislative Council. A parallel provision is to be found in Sec. 32 of the Bankruptcy Act, 1883."—*Notes on Clauses*. "We propose to lay upon him as an undischarged insolvent, so long as he remains undischarged, certain civil disabilities, such as incapacity to hold certain offices. That is, if I may say, fairly based on the principle that a man who cannot manage his own affairs should not be entrusted with the affairs of the others."—*Speech*.

Under the English Bankruptcy Acts an adjudication of bankruptcy is a disqualification for holding public offices, *e.g.*, being or acting as a Member of either Houses of Parliament, a Justice of the Peace, a Mayor or Alderman or Councillor, Guardian or Overseer of the Poor, Member of a Sanitary authority, Burial Board, vestry or County Council, &c. and if he is adjudged bankrupt whilst holding any of these offices the offices thereupon become vacant. The disqualification is removed and ceases (1) if and when the adjudication order is removed and ceases, (2) when the bankruptcy was caused by misfortune, and not by any misconduct on the part of the bankrupt, but the bankrupt may appeal from a refusal of it.

Appeal.—It is in the discretion of the Court to grant or refuse a certificate to the effect that the insolvency was caused by misfortune and without any misconduct on the part of the insolvent. An appeal lies against an order of refusal to grant such certificate but not against an order granting such a certificate, under Sec. 73 (3).

PART V.

SUMMARY ADMINISTRATION.

74. [48] When a petition is presented by or
 Summary administra- against a debtor, if the Court is
 tion. satisfied by affidavit or other-
 wise that the property of the debtor is not likely to

exceed in value five hundred rupees, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon *the provisions of this Act shall be subject to the following modifications, namely:—*

- (i) unless the Court otherwise directs, no notice required under this Act shall be published in the local official Gazette;*
- (ii) on the admission of a petition by debtor, the property of the debtor shall vest in the Court as a receiver;*
- (iii) at the hearing of the petition, the Court shall inquire into the debts and assets of the debtor and determine the same by order in writing, and it shall not be necessary to frame a schedule under the provisions of section 33;*
- (iv) the property of the debtor shall be realised with all reasonable despatch and, thereafter, when practicable, distributed in a single dividend;*
- (v) the debtor shall apply for his discharge within six months from the date of adjudication; and*
- (vi) such other modifications as may be prescribed with the view of saving expense and simplifying procedure:*

Provided that the Court may at any time direct that the ordinary procedure provided for in this Act shall be followed in regard to the debtor's estate, and thereafter the Act shall have effect accordingly.

NOTES.

Review.—This is section 48 of Act III of 1907, based on sec. 121 of the Bankruptcy Act, 1883. The reasons for the amendments introduced in this section are thus explained:—

“The summary administration of petty insolvencies is now largely governed by rules made by the High Courts under section 15 (2) (c) of the Act, but it seems desirable that the Act itself should contain more detailed provisions than at present, and that further simplification of procedure should be effected.”—*Statement of Objects and Reasons*
 “We propose to simplify the procedure further in order that there may be more expeditious winding up and distribution of assets.”—*Speech*.

Property.—The debtor's property after deduction of, (1) property in the hands of secured creditors, Sec. 28 (7), (2) debts which are excluded from the schedule under Sec. 34, *i.e.*, debts enforceable by distraint, (3) property exempted from attachment under the C. P. C. (4) the costs of execution and preferential debts, Sec. 52, should not exceed in value Rs. 500. An order for summary administration of debtor's estate may be made after the presentation of a petition by or against him, when the Court is satisfied by affidavit or otherwise or by the Official Receiver's report that the debtor's property is not likely to exceed the value of £300, section 121 Bankruptcy Act of 1883. A similar order may be made when the Court is satisfied that the debtor's property after deduction of property in the hands of secured creditors, debts enforceable by distraint, the costs of execution under Sec. 46 (1) of that Act, and preferential debts is not likely to exceed in value £300. *Halsbury's Laws of England*, Vol. II p. 284.

Modifications.—The making of the order under this section under the provisions of the Act which apply to ordinary insolvency cases are subject to certain modifications. These modifications however do not in any way affect the provisions of the Act relating to the examination and discharge of the debtor.

PART VI.

APPEALS.

75. [46] (1) *The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District*

Appeals.

Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final :

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit :

Provided further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908.

(2) Any *such* person aggrieved by *any such decision or order of a District Court as is specified in Schedule I, come to or made* otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court.

(3) Any *such* person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

(4) The periods of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days respectively.

NOTES.

Review.—This is section 46 of Act III of 1907, corresponding to Sec. 104 of the Bankruptcy Act, 1883. The section deals with appeals in insolvency matters. Clause (2) specifies by reference to Sch. I of the Act the various orders against which a person aggrieved by a decision of a District Court sitting as an Original Court of insolvency jurisdiction could prefer appeal to the High Court. Clause (3) provides that if any appeal is sought to be preferred from any other order of the

District Court made in the exercise of original insolvency jurisdiction, that can only be done by leave of the District Court or the High Court. But Clause (1) which deals with appeals to the District Court from orders made in the exercise of insolvency jurisdiction by a Court Subordinate to a District Court, imposes no restriction and makes no enumeration of the orders from which alone an appeal will lie. The question for consideration is whether any order and every order made by an Insolvency Court, Subordinate to a District Court, is appealable, or whether there are limits to the right of appeal.

Sec. 5 of this Act says, "*subject to the provisions of this Act, the Court in regard to proceedings under the Act, shall have the same power and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.*" There are certain orders which are not appealable under the Code of Civil Procedure. Sec. 104 and Or. XLIII C. P. Code enumerates the various orders from which an appeal will lie. If Sec. 75 of this Act is to be regarded as complete and self-contained, then it might be contended that an order would be appealable under the Insolvency Act, though a similar order to which the provisions of the C. P. Code are applicable would not be appealable. That this is the reasonable construction of the section would appear clearly from the Statement of Objects and Reasons and Select Committee Report to Act III of 1907.

The enactment of this section was thus explained: "As usual, the question of appeals presents features of no inconsiderable difficulty. The solution here suggested is, first, to subordinate to the District Court all other insolvency courts; secondly, to follow the English Statute of 1883 so as to give an appeal from *all* orders of subordinate courts to the District Court whose appellate order should however be final; thirdly, to limit strictly to particular classes of orders the right of appeal from orders made by a District Court otherwise than in appeal; and fourthly, for this purpose to treat as a District Court any subordinate Court to which the District Court may have transferred an appeal."—*Statement of Objects and Reasons to Act III of 1907.* "A right of appeal is given to the High Court from any order made by a District Court in the exercise of original insolvency jurisdiction, but except in regard to certain specified orders, sub-clause (3) of the section requires the leave of either of the District Court or of the High Court to be first obtained."—*Select Committee Report to Act III of 1907.*

The Amendments.—The amendments introduced in this section by the present Act are thus explained in the *Select Committee Report*, dated 24th September, 1919. "There are conflicting decisions of the High Courts as to the meaning of the words '*any person aggrieved*.' We have therefore proposed further amendments in Sec. 46 of the Act with the object of making it clear that creditors as well as the Receiver are entitled to the benefits conferred by that section." In the recent case of *Naidar v. Ramji Lal*, 23 A. L. J. 503, a preliminary objection was taken that no appeal lay on the ground, that a creditor was not a person aggrieved and, therefore, had no right of appeal. The respondent relied upon the decisions in *Jhabba Lal v. Shib Charan Das*, I. L. R. 39 All. 152. Daniels, J., in delivering the judgment, held that that was a decision under Act III of 1907. Under that Act there was a difference of opinion between the Allahabad High Court and the Madras High Court. The Allahabad High Court held that *the Receiver was the only person* who could appeal in such cases, whereas the Madras High Court in *Tiruvengkatachariar v. Thangayiammal*, I. L. R. 39 Mad. 479, held that *an individual creditor was a person aggrieved and was entitled to appeal*. This conflict of opinion has been set at rest by an alteration in the language of the present Insolvency Act. Sec. 46 of Act III of 1907 gave a right of appeal "to any person aggrieved by an order made in the exercise of insolvency jurisdiction." In Sec. 75 of Act V of 1920 these words have been changed to "the debtor, any creditor, the Receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction." In sub-section (2), these words are summed up as "*any such person aggrieved by any such decision*." The alteration in the language of the present Act indicates an acceptance of the Madras view that *a creditor is a person aggrieved* by the decision in a case of this kind. The decision clearly is adverse to his interest if it reduces the amount of property out of which he is entitled to claim a dividend.

Person aggrieved.—*Vide Notes under Sec. 68.* Where an alienation of property made by an insolvent prior to adjudication is annulled under Sec. 36 the transferee is an aggrieved party (*Lalji Sahay v. Abdul Gani*, 15 C. W. N. 253; 12 C. L. J. 452) and he is entitled to appeal. The proper person to make an application under Sec. 36 is the Receiver, and he is a necessary party to such a proceeding, *Hanseswar v. Rakhal*, 18 C. W. N. 366; 18 C. L. J. 359. An Official Assignee can appeal when he is an aggrieved person, *Official Assignee*

v. Ramachandra, 33 Mad. 134. A creditor has no right of appeal against an order made under Sec. 43, now 69, as he is not a person aggrieved, *Iyappa v. Manick Ansari*, 40 Mad. 603 F. B. A man who is disappointed of a benefit which he might have received if some other order had been passed is not a person aggrieved, *Radhamohan v. Ghasiram*, 40 Ind. Cas. 96: 38 P. W. R. 1917: 93 P. R. 1917. Where an insolvent called upon to produce his books, give inventories of his properties &c., fails to produce them and an application by a creditor under old Sec. 43 now 69, for action to be taken against the insolvent was dismissed by the Court, held, that there was no appeal at the instance of the creditor under Sec. 46, now 75, against the order refusing to proceed against the insolvent in as much as the provisions contained in Sec. 43, now 69, are of a disciplinary character and that the person, if any, who is really aggrieved by reason of the default of the insolvent is the Court to which proper assistance had not been rendered by the debtor and not any person who sets the Court in motion, *Palaniappa Chetty v. Subramaniam*, 1920 M. W. N. 135: 38 M. L. J. 388: 54 Ind. Cas. 740. A Receiver of an insolvent estate is not an aggrieved party and is not entitled to appeal against an order refusing to take action under Sec. 43, now 69. *Bhagwant Kishore v. Sanwal Das*, 19 A. L. J. 701: 61 Ind. Cas. 802. If the Court refuses to annul a transfer under Sec. 53 of the Act, the person aggrieved by the Court's order is the Receiver and he alone has a right to appeal against the order. The creditors of the insolvent are not persons aggrieved by the order within the meaning of Sec. 75 and therefore have no *locus standi* to appeal against the order. *Iswar Dass v. Latha Ram*, 62 Ind. Cas. 824. The Official Receiver removed from office has under Sec. 75 a right of appeal as a "person aggrieved" by the order. *Official Receiver, Tanjore v. Nataraja Sastrigul*, 46 Mad. 405; 72 Ind. Cas. 225: 1923 A. I. R. 355 (Mad.). An adjudicated insolvent is entitled as a person aggrieved to appeal against an order admitting a person as a creditor. *Subramania v. Theetheappa*, 47 Mad. 120: 45 M. L. J. 166. Sec. 43 (1) does not say by whom the application for annulment has to be made. But it is clear that a creditor who is affected by the adjudication is certainly a person entitled to apply to the Court under Sec. 43; and if his claim is dismissed without proper reason for it, he will certainly be a person aggrieved under Sec. 75, adopting the definition of the expression given in *Ex parte Sidebotham*, (1880), Ch. D. 458. *Amunagiri v. Kandaswami*, 83 Ind. Cas. 955. .

Court subordinate to a District Court.—Though under Sec. 3 “the Local Government may invest any Court subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall, within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act,” still however anomalous it may seem, the appeals from the decision of a Subordinate Judge having concurrent powers with the District Judge should lie to the District Judge. Sec. 75 (1) clearly contemplates the exercise of insolvency jurisdiction by a subordinate Court; and expressly provides that appeals against such orders shall lie to the District Court. This state of things is not uncommon as, for instance, it may be pointed out that appeals against the decision of subordinate judges in suits below Rs. 5,000/- lie to the District Judges, although in respect of such suits they have concurrent jurisdiction. *Nidhon Mullick v. Ramani Mohan*, 63 Ind. Cas. 848. Courts of Additional District Judges are not subordinate to the District Courts and therefore appeals from the orders of the Court of the Additional District Judge lie to the High Court, *Makkanlal v. Srilal*, 34 All 382: 9 A. L. J. 371: 14 Ind. Cas. 162, *Chiranjilal v. Emperor*, 12 A. L. J. 1105; 25 Ind. Cas. 686. An appeal against an order in insolvency passed by a Court of Small Causes exercising the powers of a Sub-Judge will lie to the District Judge, and this appellate jurisdiction is not dependant upon either the value of the decree in respect of which the order in insolvency was obtained or on the amount of the debts entered in the schedule of debts filed by the applicant for a declaration of insolvency, *Debi Prasad v. Jumna Das*, 23 All 56. See also *Sitharam v. Vaithilinga*, 12 Mad. 472 followed in *Chugmull v. Jainarain*, 15 C. L. J. 238: 16 C. W. N. 80 n, *Vaikunta v. Moidin*, 15 Mad. 89, *Shanker, v. Vithal*, 21 Bom. 45, *Munekshah v. Dudubhai*, 27 Bom. 604. In the Punjab the Divisional Court is deemed to be the District Court or principal Civil Court of original jurisdiction for the purposes of any proceedings under the Provincial Insolvency Act, *Ram Kissen v. Umaro Bibi*, 18 P. W. R. 1916: 33 Ind. Cas. 730; when a Deputy Commissioner sets aside a transfer made by the insolvent in a case transferred to him by the District Judge after adjudication, an appeal against the order of the Deputy Commissioner lay to the District Court and not to the High Court, *Chagmull v. Jainarain*, 15 C. L. J. 238. Again in *Chaturbhuj v. Hirulal*, 80 Ind. Cas. 858: 1925 A. I. R. (Cal.) 335, it has been held that the Court of a Deputy Commissioner, who has been invested with powers of a Subordinate Judge, is subordinate to the Court of the

District Judge within the meaning of Sec. 75 (2), and an appeal against his order in the exercise of insolvency jurisdiction lies to the District Judge and not to the High Court where the law being clear, there was no excuse for preferring to the High Court an appeal which lay to the District Judge, the High Court refused to return the memorandum of Appeal, and following *Debi Prasad v. Jumna Das*, 23 All. 56, *Muneck v. Dadabhai*, 27 Bom. 604, dismissed the appeal. No appeal lies against an order of the Official Receiver dismissing an insolvency petition under Sec. 22, now 68, *Chidambaram v. Nagappa*, 38 Mad. 15: 24 M. L. J. 73: 16 Ind. Cas. 820.

"Final."—The words 'shall be final' evidently means not open to second appeal. But orders passed in the exercise of insolvency jurisdiction by a subordinate or District Court are subject to review, *In Re. Bhagawan Das*, 4 Bom. 48, *Mool Chand v. Sarjoog Pershad*, 7 C. L. J. 268: 12 C. W. N. 273. An order made in appeal by a District Judge in an insolvency proceeding directing the Lower Court to take and submit additional evidence is not a final order within the meaning of Sec. 75 (1) and the High Court has power, in revision, to set that order aside. *Gangadhar v. Shridhar*, 61 Ind. Cas. 589.

Provided that the High Court.—"Exception has been generally taken to the restriction placed on the rights of appeal by clause 42 of the Bill as introduced. We now propose to confer upon the High Courts in respect of any cases decided on appeal by a District Court powers analogous to those which are conferred on them by Sec. 25 of the Provincial Small Cause Courts Act, 1887,"—*Select Committee Report to Act III of 1907*.

Second Appeal.—A second appeal is allowed from the appellate order of the District Judge only under the provisions of Sec. 100 of the C. P. C. When a question is decided under Sec. 4, a Second Appeal would lie under Sec. 75, but only on a point of law as provided in Sub-section (1) of Sec. 100 C. P. Code. *Seth Sheolul v. Giridharilal*, 1924 A. I. R. (N.) 361: 78 Ind. Cas. 140.

Sub-section (1).—It will be seen that Schedule I refers only to appeals which lie to the High Court from the decisions and orders of the District Court. But there is no schedule of decisions and orders of the Subordinate Courts from which an appeal lies to the District Court. The sub-section (1) lays down "the debtor, any creditor, the Receiver or any other person aggrieved by a decision come to, or an order made in the exercise of Insolvency jurisdiction by a Court subordinate to the District Court may appeal to the District Court."

Therefore an appeal lies from *all orders* passed by a subordinate Court to a District Court provided they are made and passed in the exercise of insolvency jurisdiction. A District Judge sitting as an Appellate Court in insolvency has the same powers as an Appellate Court under the Code of Civil Procedure. *Inter alia* he is competent to review his judgment in appeal, and, if he does so, an appeal from that order will only lie to the High Court if the provisions of Or. XLVII, r. 7 C. P. C. are applicable. *Munna Lal v. Kunj Bihari Lal*, 44 All 605: 20 A. L. J. 517.

Sub-section (2).—It should be noted that the appeal from an order passed by the District Judge in his original insolvency jurisdiction and not in his appellate jurisdiction lies to the High Court; so also from orders of Additional District Judges. The original decisions and orders from which an appeal lies to the High Court under this section are mentioned in Schedule 1. A decision on a question whether an insolvent, three years before the insolvency, sold his property merely with the intent to defraud and delay his creditors is a decision on a question of title within the meaning of Sec. 4 of the Provincial Insolvency Act and is appealable under Sec. 75 (2) of the Act, *Shikri Prasad v. Hafiz Aziz Ali*, 19 A. L. J. 862: 63 Ind. Cas. 601.

Sub-section (3).—This sub-section provides that decisions and orders of the District Judge in his original jurisdiction other than those mentioned in Schedule I, *i.e.*, against which no right of appeal is provided may be appealable to the High Court with the leave of the District Judge or with the leave of the High Court.

Leave.—"The High Court having concurrent jurisdiction with the District Judge to grant leave to appeal from an order under the Insolvency Act can do so when such leave has been refused by the District Judge. When such leave is granted by the High Court there is no necessity for a further hearing under Or. XLI. r. 11 of the C. P. C." *Madhu Sudhan v. Parbati Sundari*, 19 C. W. N. 760. Where a District Judge has passed an order directing the sale of an occupancy holding belonging to the insolvent who objected to the sale on the ground that it is not transferable by custom, the District Judge acts properly in giving leave to appeal under sub-section (3) in as much as the order finally decided a question in controversy between the parties, namely, whether the holding could or could not be sold, *Arman Sardar v. Satkhira Jt. Stock Co., Ltd.*, 18 C. L. J. 564: 20 Ind. Cas. 273. Leave will not be granted as a matter of course: the Court will refuse leave in unimportant cases where no question of law is involved, *In*

Re Cambell, 1884, 14 Q. B. D. 32. An appeal does not lie against an order giving or refusing leave, *Louis v. Esdale*, 1891, A. C. 210. Where the High Court dismissed an appeal from the order of the District Judge rejecting an application to be adjudged an insolvent on the ground of the abuse of the process of the Court, it is proper to the High Court to certify the case as a fit one for appeal to the Privy Council, *Chatrapat Sing v. Kharay Sing*, 40 Cal. 685: 17 C. W. N. 752: 17 C. L. J. 547. Where property was sold in insolvency proceedings and the sale confirmed, and under Sec. 46 (2), now 75 (3), the District Judge refused to grant leave to appeal, the High Court is competent to grant such leave, *Jugal Kishore v. Ishar Das*, 63 P. R. 1919: 51 Ind. Cas. 695.

Privy Council.—The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council that may otherwise exist. Where an application for insolvency was dismissed under Sec. 15 of the Insolvency Act, now Sec. 25, and an appeal was also dismissed in the High Court under Or. XLI, r. 11, held that an appeal to the Privy Council was competent if the matter was appealable in other ways, *Chatrapat Sing v. Kharay Sing*, *supra*. A judgment passed by the High Court in its appellate jurisdiction setting aside or annulling a prior order is appealable under Clause 39 of the Letters Patent to the Privy Council. In an insolvency matter, original or appellate, an application for leave to appeal lies under Clause 39 of the Letters Patent, even if no such application lies under Sec. 109 C. P. Code. *Annamalai Chetty v. Official Assignee, Madras*, 1925 A. I. R. (Mad.) 243.

Parties.—In an appeal by one of the creditors, all the creditors need not be joined as party respondents, *East India Cigarette Mfg. Co., Ltd., v. Anando Mohun Basak*, 24 C. W. N. 401. The auction purchasers are necessary parties, *Khaira v. Salemraj*, 51 Ind. Cas. 985.

Power and Procedure.—A Court exercising jurisdiction under this section has power to go behind a judgment and enquire into the validity of a debt, if there are circumstances which tend to show that there has been fraud, collusion or miscarriage of justice. *Anandji Damodur v. James Finlay & Co.*, 62 Ind. Cas. 441.

Sections 47 & 108 of the C. P. C. 1908, apply to appeals under Sec. 46, now 75. Hence a respondent is entitled to file cross-objection under Or. XLI, r. 2, *Algappa Chettier v. Chakalingam*, 40 Mad. 904.

Sub-section (4). Limitation.—This sub-section should be read with Sec. 78 *infra*. Act III of 1907 was held to be a special law and as such Secs. 5 & 12 of the Limitation Act, 1908, were held not to be

applicable to applications and *appeals* under Act III of 1907. Under Act III of 1907 no appeal or application could be filed after the period prescribed even if there was sufficient cause, and the time requisite for obtaining copies of the orders or decrees appealed against was not excluded. On account of the conflict of decisions in the several High Courts as to the applicability of Secs. 5 & 12 of the Limitation Act to the Provincial Insolvency Act it has been specially enacted by Sec. 78 *infra* that these sections should apply to insolvency proceedings. In *Dropadi v. Hiralal*, 34 All 469 F. B., *Ram Kissen v. Umrao Bibi*, 18 P. W. R. 1916: 33 Ind. Cas. 730, it was held that Secs. 5 & 12 of the Limitation Act would apply to insolvency matters, but in *Sivaramiah v. Bhujanga*, 39 Mad. 596, *Jugal Kishor v. Gur Narain*, 33 All 738, *Koppartha v. Aravati*, 41 Mad. 169, held that the general provisions of the Limitation Act should not be introduced into the construction of Sec. 46 (4), now 75 (4). In computing the period of limitation for appeals under this Act principles of Secs. 5, 9 & 10 of the General Clauses Act, X of 1897 should be applied, *i.e.*, the date on which the act appealed against is done and the last day if *dies non* should be excluded, *Chavadi Ramaswami v. Venkateswara*, 42 Mad. 13: 35 M. L. J. 531: 48 Ind. Cas. 952.

PART VII.

MISCELLANEOUS.

76 [49] The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall, subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had.

Costs.

NOTES.

Review.—This is section 49 of Act III of 1907, based upon Sec. 105 (1) of the Bankruptcy Act, 1883. “We propose to allow the Courts a full discretion in the matter of awarding costs subject only to Rules made in this behalf.”—*Select Committee Report to Act III of 1907*. Under Rule 20 of Calcutta High Court Old Provincial Insolvency Rules

"all proceedings under the Act down to and including the making of an order of adjudication shall be at the costs of the party prosecuting the same, but when an order of adjudication has been made, the costs of the petitioning creditor shall be taxed and be payable out of the estate."

In the matter of awarding costs the ordinary rule should be observed that costs should follow the event, *Ghansyam v. Muroba*, 18 Bom. 474. The discretion given to the Courts in the matter of awarding costs is one which should be exercised with reference to general principles. Where there has been no misconduct, omission or neglect which would induce the Court to refuse costs on the part of the one who comes into Court for enforcing a legal claim, the Court has no discretion but must grant him costs, *Kuppuswami v. Zamindar*, 27 Mad. 341. If the Official Assignee brings an unsuccessful motion, however careful he may have been, the order that the Court would make generally would be that he is to pay the Respondent's costs, and he will have the right of indemnity given him by the previous order of the Court. Or he may obtain an indemnity from the creditor or other person in whose interest the motion is brought before he starts proceeding. The order for costs should not be directed to be limited to the assets in the hands of the Official Assignee when the Respondent is not in any way in default for which he may be partially mulcted in costs, *Re Suresh Chandra Gooyee*, 23 C. W. N. 431.

77. [50] All Courts having jurisdiction in insolvency and the officers of such Courts to be auxiliary to each other. Courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of a Court seeking aid with a request to another of the said Courts shall be deemed sufficient to enable the latter Courts to exercise, in regard to the matters directed by the order, such jurisdiction as either of such Courts could exercise in regard to similar matters within their respective jurisdictions.

NOTES.

Review.—This is Sec. 50 of Act III of 1907, based upon Sec. 118 of the Bankruptcy Act, 1883. Under this section all Courts having insolvency jurisdiction under the Act have been empowered to enforce

the orders of other Courts which have like jurisdiction.”—*Statement of Objects and Reasons to Act III of 1907.*

This section should be read with Sec. 36 supra, and vide notes thereunder. In Re, Issac Shrager, 33 Cal. 1062, some of the partners of a firm filed their petition in insolvency in Calcutta and others had been adjudicated bankrupts in England. In the insolvency proceedings in Calcutta an order was made that such proceedings should be in aid of and auxiliary to the bankruptcy proceedings in England. In Re. Jevandas Jhavar, 40 Cal. 78: 18 Ind. Cas. 908, where prior to an adjudication order under Act III of 1909 the property of the insolvent had been sold and the sale proceeds were brought into the Delhi Court, under Sec. 50 of Act III of 1907, now 77, the latter Court will have to aid the Presidency Court as the assets of the insolvent in any part of British India vests in the Official Assignee under Act III of 1909.”

‘Every British Court having insolvency jurisdiction is bound to act in aid of and be auxiliary to each other in insolvency matters.’ *In Re. Naoroji Talati, 33 Bom. 462, Re. Manekji, 10 Bom. L. R. 84.* The Insolvency Court in Bombay has no jurisdiction to restrain a decree-holder from filing a suit against an insolvent who has obtained his discharge in an insolvency Court in a foreign State within whose jurisdiction the insolvent has property, for recovering a debt in respect of which the discharge had been obtained. The order of discharge granted by the Insolvency Court in Bombay would be recognised by all Courts in British Empire but there is no obligation in courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order, *Lukhmiram v. Punamchand, 22 Bom. L. R. 1173.* In a suit for dissolution of partnership and for partnership accounts in the Calcutta High Court B. was appointed Receiver of the partnership assets by the said Court. Subsequently X brought a suit in the Court of the Subordinate Judge at Dhanbad in Behar, against the partners to enforce a mortgage executed by one of them in respect of certain partnership assets, and with the permission of the Calcutta High Court made the Receiver also a defendant in the suit. The plaintiff in the latter suit procured the appointment of the aforesaid B as Receiver of the mortgaged properties by the Subordinate Judge who gave certain directions which were not reconcilable with the terms of the order of the Calcutta High Court. *Held, setting aside the order of the Subordinate Judge, that where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict.*

of jurisdiction. *Sridhar Chowdhury v. Mugneeram Banger*, I. L. R. 3 Pat. 357: 78 Ind. Cas. 620.

Jurisdiction.—Sec. 18 of the Presidency Town Insolvency Act, 1909 does not confer power on the Commissioner in Insolvency to stay insolvency proceedings pending against the insolvent in any other Court. *In Re. Manickchand Virchand*, 47 Bom. 275. The above view of the Bombay High Court is not accepted by the Calcutta High Court as will appear from the Judgment of *In Re. Jivandas Jhawar*, 40 Cal. 78: 18 Ind. Cas. 908.

78. [New] (1) *The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 4 shall be deemed to be a decree.*

(2) *Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded:*

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act.

NOTES.

Review.—This section is new, and its introduction is explained in the Select Committee Report, dated 24th September, 1919 thus: "We have adopted the suggestion that where a creditor's right to sue is barred by the provisions of the Act the period between the making of an order of adjudication and the annulment of such an order shall be excluded from the period of limitation applicable to the suit. These

provisions however will not apply to suits in respect of debts which are provable but not proved under the Act.

Nothing in Act V of 1920 affects the rights of the creditors to realise their dues by the ordinary process of law, provided he is within limitation. The insolvency proceedings will not extend the period of limitation prescribed for a suit or application in respect of a debt provable but not proved.

Act III of 1907.—In Act III of 1907 there was no provision as to whether the Act would be governed by the general provisions of the Limitation Act and therefore there arose a conflict of decisions in the different High Courts as to whether in the absence of a special provision in the Act itself in that behalf, the general provisions of the Limitation Act as stated in Ss. 5 & 12 of the Act would govern these cases. Section 78, Act V. of 1920, did not create for the first time or take away any substantial right but that it merely regulated the procedure applicable to appeals and applications under the Provincial Insolvency Act though the proceedings may have been instituted under the old Act. *K. P. S. Karuthian Chettiar v. R. M. M. Ramachetty*, 1923 M. W. N. 746: 45 M. L. J. 844: 80 I. C. 376: 1924: A. I. R. (M.) 400. On the 28th June 1919 a creditor presented a petition for adjudicating his debtor an insolvent under Sec. 6 (4) of Act III of 1907. The petition having been presented in a wrong Court was returned and re-presented to the District Court which was the proper Court on 1st October 1919. The act of insolvency on which the petition was based was an alleged fraudulent transfer by the debtor of his property on 31st March 1919, and the insolvency petition was presented to the District Court more than three months after that date. On 21st February 1921 the District Court purporting to act under Sec. 78 of Act V. of 1920 excused the delay in the presentation of the petition and ordered an enquiry into the merits. Held by the High Court that the petition had become barred while Act III of 1907 was in force, and that the District Court had no power under Sec. 78 of Act V. of 1920, to excuse the delay so as to revive a barred debt. *Aiyaparaju alias Ayyappa v. Veenu Venkata Krishnayya* 44 M. L. J. 303: 1923 M. W. N. 195. 72 Ind. Cas. 488.

Madras.—“An appeal under Sec. 56 (3) beyond the period fixed therein is barred by limitation as the time requisite for taking copies of the order appealed against cannot be deducted under the Act, or under sec. 12 (2) or 29 of the Limitation Act, 1908. The High Court can convert such application into a civil revision petition under Cl.

15 of the Charter Act," *Sivaramiah v. Bhujanga*, 39 Mad. 596. "The Provincial Insolvency Act is not a self-contained enactment, nevertheless, the general provisions of the Limitation Act should not be introduced into the construction of Sec. 46 (4) now 75 (4). Recourse should not be had to the general provisions of the Limitation Act in dealing with the admission of petition and appeals presented after the time prescribed under the Provincial Insolvency Act," *Kopparthi v. Araveli*, 41 Mad. 169: 33 M. L. J. 566. "In computing the period of limitation for suits instituted against a person after an order of adjudication has been annulled, Sec. 15 of the Limitation Act does not permit the deduction of time during which the order was in force," *Ramaswami Pillai v. Gobindaswami*, 42 Mad. 319. "In computing the period of limitation for appeals under the Act the principles of Ss. 5, 9 & 10 of the General Clauses Act should be applied, i. e., the date on which the act appealed against is done and the last day if *dies non* should be excluded," *Chavadi v. Venkateswara*, 42 Mad. 13.

Allahabad.—"Act III of 1907 is a special law within the meaning of Sec. 29 of the Limitation Act. But in as much as it is not a complete code in itself there is nothing to prevent the application thereto the general provisions of the Indian Limitation Act. Such general provisions do not affect or alter the period prescribed by special law but only the manner in which that period is to be computed," *Dropadi v. Hirulal*, 34 All. 496 F. B., *overruling Jugal Kishore v. Gur Narain*, 33 All. 798: 8 A. L. J. 833, *Thakur Prosad v. Purna Lal*, 35 All 410: 11 A. L. J. 603: 20 Ind. 607.

The Punjab.—"Sec. 5 of the Indian Limitation Act applies to cases under the Provincial Insolvency Act," *Ram Kissen v. Umrao Bibi*, 80 P. W. R. 1916: 33 Ind. Cas. 730. "The Provincial Insolvency Act is a special law but in as much as it is not in itself a complete code there is nothing to prevent the application thereto of the general provisions of the Limitation Act," *Waryam v. Wadhwa*, 8 P. W. R. 1918: 46 Ind. Cas. 588.

Calcutta.—"An application for execution of a decree was not time-barred though made more than 3 years after a previous application, where it appeared that the judgment-debtor had in the meanwhile filed a petition of insolvency in which the judgment-debt in question was specified," *Rampal Sing v. Nandolal Marwari*, 16 C. W. N. 346 following *Maniram Sett v. Sett Rupchand*, 33 Cal. 104: 10 C. W. N. 874.

To set at rest these conflicting decisions it was necessary that a specific provision should be made in the Provincial Insolvency Act itself, and this new section has been enacted and introduced to effect the same.

It is now the settled law that a debt does not become barred by lapse of time, if it was not barred at the commencement of the bankruptcy. The bar of time ceases to run (or to further run) after adjudication, as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed. *Baranoshi Koor v. Bhabadav Chatterji*, 34 C. L. J. 167. In *Sivasubramania Pillai v. Theetheappa Pillai*, 45 M. L. J. 166: 1923 M. W. N. 895, it was observed: "*Esarte Ross*, 2 Gl. & Jameson's Bankruptcy cases 46 & 330, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Esarte Lancaster Banking Corporation, In Re. Westby*, 10 Ch. D. 776. A very clear statement of the principle is contained in the following passage in the judgment of Bacon, C. J. in that case. "When a bankruptcy ensues there is an end to the operation of that statute with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy and the Statute of Limitation has no application at all to such a case, or to the principles by which it is governed." The authority of these decisions has not been in the slightest degree shaken by *Benson, In Re. Bower*, (1914) 11 Ch. 68. On the contrary the judgment in it while holding that the pendency of the bankruptcy proceedings did not save a claim made in the course of an administration suit from being barred by the Statute of Limitation carefully distinguished *Esarte Ross* and other cases similar to it as being cases where the proof was in the bankruptcy itself."

Decree.—*Vide* Notes under Sec. 4 *supra*.

97. [51] (1) The High Court may, with the previous sanction, in the case of the High Court of Judicature at Fort William in Bengal, of the Governor-General in Council, and, in the case of any other High Court, of the Local Government, make rules for carrying into effect the provisions of this Act.

Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide—

- (a) for the appointment and remuneration of receivers (other than Official Receivers), the audit of the accounts of all receivers,
- (b) for meetings of creditors,
- (c) for the procedure to be followed *where the debtor is a firm, and*
- (d) *for the procedure to be followed in the case of estates to be administered in a summary manner.*

(3) All rules made under this section shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall on such publication, have effect as if enacted in this Act.

NOTES.

Review.—This is section 51 of Act III of 1907. "The section empowers the High Courts to make Rules for carrying into effect the provisions of the Act. These powers were subject to the same sanction as is required in the case of Rules made under the Indian High Courts Act, 1861, and under the Code of Civil Procedure."—*Statement of Objects and Reasons to Act III of 1907.*

The amendments are thus explained by the *Select Committee Report dated 24th September, 1919*: "We have by a new clause provided that Rules may be made regarding the procedure to be followed in cases where the debtor is a firm as in Section 112 (2) of the Presidency Towns Insolvency Act, III of 1909."

"At the time of making an order of adjudication against the partners of a firm the Court need not order as to the course of administration in insolvency with reference to the joint estate of the firm and the separate estate of the partners. That is a matter that must be considered and determined during the course of the insolvency proceedings," *Debendra Chandra Sikdar v. Purusottam Das*, 55 Ind. Cas. 186.

80. [52] (1) The High Court, with the like sanction, may from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court, have all or any of the following powers, namely :—

- (a) to hear insolvency petitions, to examine the debtor and to make orders of adjudication;
- (b) to frame schedules and to admit or reject proofs of creditors.
- (c) to grant orders of discharge;
- (d) to approve compositions or schemes of arrangement;
- (e) to make *interim* orders in any case of urgency; and
- (f) to hear and determine any unopposed or *ex parte* application.

(2) Subject to the appeal to the Court provided for by section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court.

NOTES.

Review.—This is section 52 of Act III of 1907, corresponding to sec. 99 of the Bankruptcy Act, 1883.

Clause (2).—An Official Receiver in insolvency has no power to make any order on a claim petition filed before him, as it is not a power which has been delegated to him under sec. 80 of the Act. If the claimant wants to prevent the sale by the Official Receiver of some property as belonging to the insolvent, he should apply to the District Judge direct to take action under Sec. 4 of the Act. *Vellayappa Chettiar v. Ramanatham* 47 Mad. 446; 78 Ind. Cas, 1017; 46 M. L. J. 89. Under Sec. 80, the power to make the vesting order is not delegated to the Official Receiver and the Official Receiver does not get a right to deal

with the properties of the insolvent without an express vesting order. *Kavali Sankara Rao v. Turlapati Ramakrishnayya*, 46 M. L. J. 185: 78 Ind. Cas. 294: 1924 A. I. R. (M.) 461.

When empowered by the High Court under this section an Official Receiver has the same powers as the District Court and these powers are mentioned in Clause (1). But as regards appeals from orders of the Official Receiver so empowered these appeals will lie to the District Court and not to the High Court, *Chidambaram v. Nagappa*, 24 M. L. J. 73: 16 Ind. Cas. 820.

When an adjudication of insolvency is made by an Official Receiver in the exercise of the powers delegated to him under Sec. 52 (1), now 80 (1), the insolvent's estate does not vest in him under Sec. 18, now 56, or any other provision, and will not do so unless an order vesting it in him is passed by the Court *Official Receiver, Trinchinopoly v. Samasundaram Chetty*, 30 M. L. J. 415. A sale held by him of property not vested in him is invalid and does not confer any right on the purchaser, *Muthasami Samiar v. Samoo Kundiari*, 43 Mad. 869: 39 M. L. J. 438: 1920 M. W. N. 537: 59 Ind. Cas. 507. In *Subba Aiyar v. Ramaswami*, 40 M. L. J. 209 their Lordships observed "This Court has had an occasion before in the case of *Muthasami Samiar v. Samoo Kandiari* to regret the deficiency of the Act which does not provide that immediately upon adjudication the estate shall vest in the Official Receiver and we note with regret that the omission has not been rectified in the Amendment Act." Where a District Judge to whom an insolvency application was presented transferred it "to the Official Receiver for adjudication and for the administration of the estate," held, that the order of the District Judge in effect amounted to an appointment of the Official Receiver as agent for sale of the property of the insolvent and that the transferee from the Receiver had a valid title, *Subba Aiyar v. Ramaswami*, *supra*,

Judicial Functions of Official Receiver.—An Official Receiver appointed under Sec. 57 exercises such judicial or quasi-judicial powers as may be conferred upon him by Rules framed by the High Court under Sec. 80. But in the case of an ordinary Receiver his duties and powers are defined by Sec. 59, and they are executive in their character and not judicial. The Official Receiver is an officer of the Court and there is no provision in law which makes it obligatory on the District Court to have the Official Receiver made a formal party in the proceedings under the Act, and the fact that he is not impleaded does not vitiate any order passed therein. *Kumaraswami, Nadar v.*

Venkataswami, 46 M. L. J. 242: 78 Ind. Cas. 857: 1924 A. I. R. (M.) 880.

81. [54] Any Local Government, with the previous sanction of the Governor General in Council, may, by notification in the local official Gazette, declare that *any of the provisions of this Act specified in Schedule II* shall not apply to insolvency proceedings in any Court or Courts having jurisdiction under this Act in any part of the territories administered by such Local Government.

NOTES.

Review.—This is section 54 of Act III of 1907. The reasons for the barring of certain provisions of the Act to certain courts are best explained in the *Proceedings of the Viceregal Council to Act III of 1907*: “It is very difficult to frame any one satisfactory law which is equally suited to different parts of the country. A law adapted for the towns is too complicated for the country districts and a law suited for the country districts is altogether insufficient for the great centres of trade. This is no new difficulty. The Select Committee has given careful consideration to this question. They feel that legal reform cannot be postponed until the requirements of the whole country become uniform and they feel that trading centres can not be left without an adequate system of insolvency merely because other parts of the country are yet less developed. On the other hand, they feel that it is desirable to avoid forcing on backward districts a law which is too complicated for their requirements. In the result they suggest that a power should be inserted corresponding to S. 1. of the Transfer of Property Act, 1882, to enable Local Governments to exempt any specified districts within their territories from the operation of certain sections of the Act.”

82 [55] Nothing in this Act shall—
Savings.

(a) *affect the Presidency-towns Insolvency Act, 1909, or section 8 of the Lower Burma Courts Act, 1900, or*

(b) apply to cases to which Chapter IV of the Dekkhan Agriculturists Relief Act, 1879, is applicable.

NOTES.

Review.—This is section 55 of Act III of 1907. “Under the Bill as introduced, agriculturists were put in a special position in regard to insolvency. They were allowed to institute insolvency proceedings if their debts amounted to the small sum of fifty rupees. Other debtors can only institute insolvency proceedings if their debt amounts to Rs. 500. The provision was originally taken by the Select Committee on the Code of Civil Procedure Bill from the Dekkan Agriculturists Relief Act. This provision has been a good deal criticised, and the Select Committee are of opinion that there is no sufficient reason for giving special treatment to agriculturists. If special treatment is to be given to them as a part of the general treatment of agricultural indebtedness, it should be struck out of the Bill, but in lieu of it provisions have been inserted to preserve any special enactments in regard to agriculturists which are now in force, and in particular, to expressly preserve the operation of the insolvency sections of the Dekkan Agriculturists Relief Act (XVIII of 1879).”—*Proceedings of the Viceregal Council, dated 15-3-1907.*

83. [56] (1) The enactments mentioned in Schedule III are hereby re-

Repeals.

pealed to the extent specified in the fourth column thereof.

(2) Where in any enactment or instrument in force at the date of the commencement of this Act, reference is made to Chapter XX (of Insolvent Judgment-debtors) of the Code of Civil Procedure, 1877, or of the Code of Civil Procedure, 1822, or to any section of either of those Chapters, such reference shall, so far as may be practicable, be construed as applying to this Act or to the corresponding section thereof.

SCHEDULE I.

[See section 75 (2).]

Decisions and Orders from which an appeal lies to the High Court under section 75 (2).

Sections.	Nature of decision or order.
4	Decision of questions of title, priority, etc., arising in insolvency.
25	Order dismissing a petition.
26	Order awarding compensation.
27	Order of adjudication.
33	Orders regarding entries in the schedule.
35	Order annulling adjudication.
37	Order declaring the conditions on which the debtor's property shall revert to him on annulment of adjudication.
41	Order on application for discharge.
50	Order disallowing or reducing entries in the schedule.
53	Order annulling a voluntary transfer.
54	Decision that a transfer of property is a preference in favour of a creditor.
69	Conviction and sentence of debtor for an offence under this section.

SCHEDULE II.

[See section 81.]

*Provisions of the Act application of which may be barred by
Local Governments.*

Provision of the Act.	Subject.
Section.	
26	Award of compensation.
28, sub-section (3)	Reputed property of an insolvent.
34	Debts provable under the Act.
38	Compositions and schemes of arrangement.
39	
40	
42, sub-section (1) and (2)	Obligation to refuse absolute discharge.
45	Method of proof of debts.
46	
47	
48	
49	
50	
51	
52	
53	
54	
55	Effect of insolvency on antecedent transactions.
61, [except clause (a) of sub-section (1) and sub-section (4)]	
	Priority of debts.

SCHEDULE II—(Contd.)

[See section 81.]—(contd.)

*Provisions of the Act application of which may be barred by
Local Governments.—(contd.)*

Provisions of the Act.	Subject.
Section.	
62	Dividends.
63	
64	
65	
66	Management by and allowance to insolvent.
72	Penalty for obtaining of credit by undischarged insolvent.

SCHEDULE III.

ENACTMENTS REPEALED.

[See section 83.]

Year.	No.	Short title.	Extent of repeal.
1907	III	The Provincial Insolvency Act, 1907.	So much as has not been repealed.
1914	IV	The Decentralization Act, 1914.	In Schedule I, Part I, the entry relating to Act III of 1907.
1914	X	The Repealing and Amending Act, 1914.	In Schedule I, the entries relating to Act III of 1907.

Model Petitions and Pleadings under Act V of 1920

Form No. 1.

Creditor's Petition under Sections 9 (1) and 13 (2) of Act V of 1920.

In the Court of the District Judge of

The humble petition of A. B. of

RESPECTFULLY SHEWETH :

1. That your petitioner resides, *or* carries on the business of—*or* personally works for gain at

2. That your petitioner had dealings with C. D. who resides, *or* carries on business *or* personally works for gain at in the District of within the jurisdiction of this Court.

3. That the said C. D. is indebted to your petitioner in the liquidated sum of Rs. payable on a dated

4. That the due date for the payment of the sum due on said by the said C. D. was the last.

5. That the said C. D. has committed within the last three months the following acts of insolvency:—

(a) he has executed transfers of his property with a view to defeat and delay his creditors ;

(b) he has suspended payment since a fortnight of his debts and has given notice thereof to his creditors asking to agree to a composition ;

(c) he has already during the last 4 days removed his stock-in-trade and is now removing his stock-in-trade at with a view to secrete the same and prevent his creditors availing thereof in satisfaction of their claims.

(d) your petitioner apprehends that he is about to conceal and remove the documents and books of account relating to his business.

In the circumstances set forth above your petitioner prays:—

(a) that an order for the appointment of an *interim* receiver of the property of the said C. D. might be passed ;

(b) an order of the attachment by actual seizure of the whole of the properties in the possession or in the control of the said debtor might be passed ;

- (c) an order for filing a true inventory of his joint and separate properties including those that were transferred within 2 years from the date of the presentation of this petition
• be passed upon the said debtor ;
- (d) an order of adjudication might be passed under Act V of 1920 ;
- (e) an order for the immediate production of books of accounts of the said business of C. D. might be passed.

And your petitioner as in duty bound shall ever pray.

I. A. B., do hereby declare that what is stated herein in paras are true to my knowledge save and except those that are stated in paras on information, and as to these I believe the same to be true.

I sign this verification to-day this day of at
A. M. at the Bar Library, at

Form No. 2.

Debtor's Petition under Section 10 (1) of Act V of 1920.

In the Court of the District Judge of

The humble petition of A. B. of

RESPECTFULLY SHEWETH :

1. That your petitioner resides or carries on business of
or personally works for gain at within the
jurisdiction of this Court.
2. That your petitioner has suffered loss and incurred liabilities
to the extent of Rs.
3. That the amount and particulars of all pecuniary claims
against your petitioner, together with the names and residences, so
far as they are known to or can by the exercise of reasonable care
and diligence be ascertained, are set forth in Schedule A, annexed
herewith.
4. That your petitioner is unable to pay his debts ; Or
That your petitioner has been arrested (or imprisoned, as the
case may be) in Execution Case No. of in the Court of the
at in the District of in execution of the
decree for the payment of money in Suit No. of in the
Court of the at in the District ; Or

5. That an order of attachment has been made by the Court of the Judge at in the District of in execution of the decree for payment of money in Suit No. of in the Court of

6. That the property which your petitioner is possessed of, together with their amount and particulars and a specification of the value of such property not consisting of money and the place or places at which any such property is to be found are truly set forth in Schedule B annexed herewith.

7. That your petitioner is willing to place at the disposal of the Court all such property save in so far as it includes such items as are exempted by the Code of Civil Procedure, 1908.

8. That your petitioner has not on any previous occasion filed any petition to be adjudged an insolvent.

In the circumstances set forth above your petitioner humbly prays that your petitioner may be adjudged insolvent under the provisions of Act V of 1820, and such other orders may be passed as the Court may deem fit and proper.

And your petitioner as in duty bound shall ever pray.

Verification as in Form 1.

Form No. 3.

Debtor's Petition where the Debtor is a Firm.

(UNDER SEC. 7 & NEW RULES NOS. 19-27 OF THE CALCUTTA & RULES 28 OF THE MADRAS & RULES 22-30 OF THE ALLAHABAD HIGH COURT.)

In the Court of the District Judge of

Insolvency Case No. of 19

The humble petition of Brown & Co.,
a firm carrying on business of
in co-partnership with A. B. C. & D. as
partners at under the
name and style of Brown & Co.

RESPECTFULLY SHEWETH:

1. That your petitioners carry on (or used to carry on) business of and their principal place of business was at within the jurisdiction of this Court.

2. That your petitioners firm, Brown & Co., consists of the following partners, viz :

- | | |
|-----|--|
| (c) | } Here insert names in full and address of all the individual partners as required by Rule 22, Calcutta. |
| (b) | |
| (a) | |
| (d) | |

3. That your petitioners, the said Brown & Co. have suffered loss in the carrying on of their business to the extent of Rs. for reasons over which they had no control, viz., (state here the reasons.)

4. That the amount and particulars of all pecuniary claims against your petitioners together with the names and residences, so far as they are known to or can by the exercise of reasonable care and diligence be ascertained, are set forth in Schedule A. annexed herewith.

5. That your petitioners, the said firm of Brown & Co., are unable to pay their debts.

6. That an order of attachment has been made by the Court of _____ in execution of the decree for payment
(Insert this paragraph if there is attachment).

7. That your petitioners submit herewith true and correct statements of the partnership properties and affairs of Brown & Co., in schedule B., as also true and correct statements of the separate and individual properties in Schedule C. D. E. & F., particulars and specifications of their value and the place or places where such properties are to be found.

9. That your petitioners are willing to place at the disposal of the Court all such properties as are set forth in the Schedules, above-mentioned both partnership and personal, save only those which are exempted by the Code of Civil Procedure, 1908.

9. That your petitioners beg leave to file herewith the books of account of the firm of Brown & Co., truly and regularly kept in the course of the business, as also the account books of the individual partners (if any).

10. That your petitioners have not on any previous occasion filed any petition to be adjudged insolvents.

In the circumstances set forth above your petitioners humbly pray that the said firm of Brown & Co., may be adjudged insolvent under the provisions of Act V. of 1920, and such other orders may be passed as the Court may think fit and proper.

And your petitioners as in duty bound shall ever pray.

We, Brown & C., do hereby declare

.....as in Form 1. ()

Signature of Partner A.

" " " B.

" " " C.

" " " D.

N.B.—If the petition is signed by one partner only it will require an affidavit made by that partner showing that all the partners concur in filing the petition and the petition should be signed—"Brown & Co. by A., a partner in the said firm."

Form No. 4.

Creditor's Petition under Sec. 21 for Ad Interim Receiver.

In the Court of the District Judge of

Insolvency Case No. of

The humble petition of A. B. of

RESPECTFULLY SHEWETH:

1. That your petitioner is a creditor of one C. D. of and that a petition has been presented by your petitioner for adjudging the said C. D. an insolvent for having committed acts of insolvency as set forth in the said petition.

2. That the said debtor C. D. has executed transfers of property, set forth in Schedule A, annexed herewith with a view to defeat and delay his creditors.

3. That your petitioner apprehends, the said debtor is attempting to execute further deeds of transfer in respect of all (or some) or the remainder of his property with a view to defeat and delay his creditors.

4. That said C. D. (a) is attempting to leave the jurisdiction of the Court; (b) has during the last four days already removed his stock-in-trade and is removing the rest of his stock-in-trade to defeat the claims of his creditors; (c) has been concealing his books of accounts and tampering with the same.

Your petitioner therefore humbly prays (a) that an order for the appointment of an *interim* Receiver to take charge of the property of the said debtor be passed at once, (b) that an order for the attachment by actual seizure of the whole of the properties of the said debtor may be passed, (c) that the said debtor may be called upon to

furnish at once a true inventory of his joint and separate properties including those that were transferred by the said debtor within two years from the date of the presentation of the petition, (d) that an order for the immediate production of his books of account in Court be passed.

And your petitioner shall

N.B.—The application is required to be supported by an affidavit.

Form No. 5.

Debtor's Petition under Sec. 23 for Release.

In the Court of the District Judge of
 Insolvency Case No. of
 The humble petition of A. B. of

RESPECTFULLY SHEWETH:

1. That one C. D. of brought a suit against your petitioner in the Court of being Suit No. of for payment of money

2. That on the day of the said C. D. obtained a decree in the said suit against your petitioner for the sum of Rs. with interest and costs.

3. That your petitioner has filed an application in this Court for being declared an insolvent and has placed all his property at the disposal of the Court. The said creditor is Creditor No. in the schedule of creditors annexed with his petition.

4. That no order of adjudication has as yet been passed on the said petition.

5. That your petitioner has not committed any act of bad faith or concealed any property with a view to defeat or delay his creditors.

6. That he is unable to pay his creditors is due to the loss in his trade or business for which he cannot be held responsible.

7. That the said C. D. has applied to the Court of for execution of the said decree in Money Suit No. of in the Court of in Execution Case No. of of the said Court, and in execution of the said decree your petitioner has been arrested (or imprisoned as the case may be).

8. That the application of the said C. D. is not *bonafide*, but made solely to extort money from your petitioner.

9. That your petitioner will be greatly prejudiced in the prosecution of his application for adjudication and in getting in and collecting dues after the order of adjudication for the benefit of the general body of creditors if he is detained in prison..

Your petitioner therefore humble prays that your Honour will be pleased to order release of your petitioner from arrest (or imprisonment as the case may be) in the above Execution Case No. of in the Court of on the application of decreeholder.

And your petitioner as in duty bound shall ever pray.

N.B.—This petition is to be supported by an affidavit.

Form No. 6.

Debtor's Application for Interim protection before adjudication.

In the Court of the District Judge of
Insolvency Case No. of
The humble petition of A. B. of

RESPECTFULLY SHEWETH :

1. That your petitioner has applied for being declared an insolvent and has placed all his property at the disposal of the court and has filed all his books of account in Court. *

2. That no order of adjudication has as yet been passed upon the said petition.

3. That Creditor No. * (or Creditors Nos.) in the schedule of creditors filed by your petitioner had obtained decrees against your petitioner for payment of money and he (or they) is taking or is threatening to take steps against your petitioner in execution of the said decrees.

4. That your petitioner has placed all his properties at the disposal of the Court and that his inability to pay his creditors arose from the loss in his trade or business for which he cannot be held responsible.

5. That the application of the said creditor (or creditors) is intended for the purpose of extorting money from your petitioner.

6. That your petitioner will be greatly prejudiced in case he is arrested or imprisoned by the Court of the at in

Execution Case No. of in execution of the decree, in the prosecution of his application for insolvency and also in the administration of his estate by the Receiver.

Your petitioner therefore humbly prays (a) that the Court may be pleased to pass an order of protection to your petitioner against the arrest of your petitioner by the said Court of in Execution Case No. of in execution of decrees for the payment of money in favour of or generally.

And your petitioner shall as in duty bound ever pray.

N.B.—The application is required to be supported by an affidavit.

Form No. 7.

Security Bond under Secs. 21 and 23.

In the Court of the District Judge of
Insolvency Case No. of

In the matter of A. B. an Insolvent.

Know All Men by these presents that I. A. B. (debtor), son of
of am held and firmly bound
to Esq., the District of Judge of in the sum
of Rs. to be paid to the said or to his successor
in office, and We, (names of sureties) son of
* of are jointly and severally held and firmly bound
to the said Esq., District Judge, in the sum of Rs.
to be paid to the said or to his successor in office for the
payment of which the said sum of Rs. to be faithfully and truly
made, I, the above bounden bind himself, my heirs, executors, administrators and representatives, and for the payment of the said sum of
Rs. we, the above bounden and
bind ourselves and each of us jointly and severally, and our and each
of our heirs, executors, administrators and representatives firmly by
these presents. Signed by ourselves and sealed with our respective
seals the day of of 19 .

Whereas by an order of the Court of the District Judge of
made on the day of in Insolvency Case No.
of under Sec. 21 or 23 of Act V of 1920 the above-
named A. B. has subject to his entering into a bond in Rs. in
the case with sureties in the same sum (or sum of Rs.
as the case may be) ordered his release on furnishing the above secu

rities for his appearance until final orders are made; And whereas the said have agreed to enter into the above written bond as sureties for the said A. B. Now the condition of the above written bond is such that if the said A. B. do and shall appear in Court whenever he may be called upon to do so and do and shall carefully observe, perform, and keep all orders and directions of the said Court of the District Judge of and in all things conduct himself properly, then the above written bond or obligation shall be void and of no effect, otherwise the same shall remain in full force and value.

Signed and sealed by
the above-named..... Seal
.....
..... Seal
in the presence of.....
..... Seal

Form No. 8.

Insolvent's Application under Sec. 31 for protection after adjudication.

In the Court of the District Judge of
Insolvency Case No. of
The humble petition of A. B. of

RESPECTFULLY SHEWETH:

1. That your petitioner has been adjudged insolvent by an order of the Court dated in the above case, and all the property that your petitioner had and was possessed of, vested in the Receiver appointed by the Court.
2. That the inability of your petitioner to pay the creditors was due to his losses in trade or business and for reasons for which he cannot be held responsible.
3. That your petitioner has filed his books of accounts which will sufficiently disclose his business transactions and financial position within three years immediately preceding his adjudication.
4. That your petitioner's Creditor No. (or Creditors Nos.) is threatening to take action against your petitioner for his arrest and imprisonment.

5. That your petitioner's other creditors will be seriously prejudiced in case your petitioner is arrested or imprisoned as by reason thereof most of his debts and other assets will remain unrealised and the executing decree-holders will not derive any material benefit thereby.

Your petitioner therefore humbly prays that the Court may be pleased to issue a general order of protection in favour of your petitioner against the arrest or imprisonment of your petitioner by Creditor No. or by any of his creditors mentioned in the schedule of creditors annexed to his petition.

And your petitioner shall.....

Form No. 9.

Creditr's or Receiver's Application under Sec. 32 for insolvent's arrest after adjudication.

In the Court of the District Judge of

Insolvency Case No. of

In the matter of A. B., an Insolvent.

The humble petition of C. D. of

RESPECTFULLY SHEWETH:

1. That A. B. of has been adjudicated insolvent by the Court in the above case by an order dated the day of

2. That the said A. B. has not produced all his books of accounts in Court and has not given a true list of his creditors and debtors and of the debts due to and from them, nor did he submit to such examination in respect of his property as was required from him by the Receiver.

3. That with intent to avoid any obligation that has been or might be imposed on him, the said insolvent A. B. has absconded or departed from the local limits of or is about to abscond or depart from the local limits of the jurisdiction of the Courts.

Your petition therefore humbly prays (a) that an order for the arrest of the said insolvent A. B. may forthwith be passed, (b) that a warrant be issued for the arrest of the said insolvent A. B.

And your petitioner shall as in duty bound ever pray.

N.B.—The application, in the case of a creditor, is required to be supported by an affidavit. In the case of the Receiver a Report to the Court by the Receiver is generally considered sufficient.

Form No. 10.**Affidavit of Proof under Secs. 33 and 49 in respect of debts provable under the Act.**

In the matter of No. of 19
 I, of make oath and say (or solemnly and sincerely affirm and declare)—

1. That the said at the date of the petition, *viz.*, the day of 19 , and still justly and truly indebted to me in the sum of Rs. as. p. for securities, bills or the like as shown by the account endorsed herein (or the following account) *viz.*, for which sum or any part thereof I say that I have not nor hath or any person by order to my knowledge or belief for use had or received any manner of satisfaction or security whatsoever save and except the following securities, &c.

Admitted to vote for Rs. Judge or Official Receiver.	} Sworn at this day of before me. Commissioner.	} Deponent's Signature.

Form No. 11.**Proof of Debts of Workmen under Sec. 61.**

I (a) of (b) make oath and say:—(or solemnly and sincerely affirm and declare)—

1. That (c) I was at the date of the adjudication *viz.*, the day of 19 and still justly and truly indebted to the several persons whose names, addresses and descriptions appear in the schedule for wages due to them respectively as workmen or others in (d) in respect of services rendered by them respectively to (e) during such periods before the date of the receiving order as are set out against their respective names in the fifth column of such schedule, for which said sums, or any part thereof I say that they have not, nor hath any of them had or received any manner of satisfaction or security whatsoever.

Admitted to vote for Rs.	} Sworn at	{ Deponent's
Judge or Official Receiver.			this day day of Signature.
	before me.	
	Commissioner.	

(a) Fill in full name, address and occupation of deponent.

(b) The above named debtor or the workman of the above named debtor or on behalf of the workmen and others employed by the above-named debtor.

(c) " I " or " the said "

(d) " My employ " or " the employ of the abovenamed debtor."

(e) " Me " or " the abovenamed debtor."

Form No. 12.

Petition under Sec. 35 for Annulment of Adjudication.

In the Court of the District Judge of

Insolvency Case No. of

In the matter of C. D. an insolvent

The humble petition of A. B. of

RESPECTFULLY SHEWETH :

1. That your petitioner is a creditor of the said C. D. to the extent of the liquidated sum of Rs .

2. That C. D. has been adjudged insolvent by an order dated
of in the above case.

3. That no notice of his application was served upon your petitioner.

4. That the said C. D. is in a solvent condition and able to pay his debts.

5. That the application of the said C. D. to be declared an insolvent is an abuse of the process of the Court.

6. That the debts of the said insolvent do not amount to Rs. 500/- and that he has not been arrested or imprisoned in execution of a decree for payment of money or that no order for attachment of his property has been made or is subsisting.

7. That the debtor does not reside, carry on business, or personally work for gain within the jurisdiction of the Court.

Your petitioner therefore humbly prays that your Honour may be pleased to annul the order of adjudication passed upon the said C. D. in the above case.

And your petitioner shall as in duty bound ever pray.

N.B.—Application may be filed by the insolvent on the ground that he has paid his creditors in full, or that there has been a want of notice or that he has not committed any acts of insolvency.

Form No. 13.

**Application under Sec. 38 submitting a Proposal for composition
or a scheme of arrangement.**

In the Court of the District Judge of

Insolvency Case No. of

The humble petition of A. B. of

RESPECTFULLY SHEWETH :

1. That your petitioner has been adjudged insolvent in the above case by an order dated the day of

2. That your petitioner has suffered loss in his trade or business and is not in a position to pay his creditors in full.

3. That your petitioner applied to his creditors and proposed to them to accept four annas in the rupee and that most of his creditors have expressed their willingness to accept the terms proposed and have signified their intention to discharge your petitioner from all liabilities to them.

4. That your petitioner is not able to pay the said four annas in the rupee in one instalment but proposed to pay the same in four equal instalments at the interval of every three months, the first instalment being payable within three months from the date of the approval of the Court.

5. That regard being had to the affairs of your petitioner the aforesaid terms of composition are fair and reasonable and calculated to benefit the general body of creditors.

6. That due provision has been made for the payment in priority to other debts all debts directed to be so paid in the distribution of the property of your petitioner.

Your petitioner therefore humbly prays that your Honour may be pleased to approve the proposal of composition and annul the order of adjudication.

And your petitioner shall

Form No. 14.**Petition under Sec. 41 for Discharge.**

In the Court of

Insolvency Case No. of

The humble petition of A. B. of

RESPECTFULLY SHEWETH :

1. That your petitioner was adjudged insolvent by the Court in the above case by an order dated the day of and it was provided by the said order that your petitioner was to apply for discharge within the day of

2. That the Receiver appointed in the case has realised the whole (or part) of the assets of your petitioner and he has declared a dividend of annas in the rupee and a dividend of annas in the rupee is likely to be shortly declared.

(In case of no assets the following paragraph should be substituted in place of paragraph 2.)

2. That your petitioner had no assets and no dividend could therefore be declared to his creditors.

3. That your petitioner's assets are not of a value equal to eight annas in the rupee on the amount of your petitioner's unsecured liabilities, has arisen from circumstances for which he cannot justly be held responsible.

4. That your petitioner had kept such books of account as were usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within three years immediately preceding his insolvency.

5. That your petitioner has not committed any act of bad faith or did not continue to trade after knowing himself to be insolvent or did not contract the debts mentioned in the schedule annexed to his petition without having any reasonable or probable ground of expectation that he would be able to pay the same and your petitioner has not failed to account satisfactorily for the loss of assets, and the deficiency of assets to meet his liabilities.

6. That your petitioner has not brought about or contributed to his insolvency by rash and hazardous speculation or by unjustifiable extravagance in living or gambling or by culpable, neglect of his business affairs.

7. That within three months before the presentation of the petition for insolvency he has not executed any transfer of his property by way of fraudulent preference.

8. That your petitioner has not concealed or removed his property or any part thereof or has not been guilty of any other fraud or fraudulent breach of trust.

Your petitioner, therefore, humbly prays that the Court may be pleased to pass an order of discharge in favour of your petitioner.

And for this petitioner shall

Form No. 15.

Petition under Sec. 42 objecting to the grant of an order of discharge.

In the Court of

Insolvency Case No. of

In the matter of an application for discharge

by A. B., an Insolvent.

The humble petition of C. D. of, a creditor to the insolvent estate of A. B.

RESPECTFULLY SHEWETH :

1. That A. B. the insolvent in the above case has applied for an absolute order of discharge under Sec. 41 of Act V of 1920.

2. That your petitioner begs leave to object to the grant of an order of discharge on the following amongst other grounds :—

(a) That the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, and that has not arisen from circumstances for which he cannot justly be held responsible ;

(b) that the insolvent omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within three years immediately preceding his insolvency ;

(c) that the insolvent continued to trade after knowing himself to be insolvent : .

(d) that the insolvent contracted debts provable under the Act without having at the time of contracting them any

reasonable or probable ground of expectation that he would be able to pay them ;

(e) that the insolvent has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities ;

(f) that the insolvent has brought on or contributed to his insolvency by rash and hazardous speculation or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs ;

(g) that the insolvent has, within three months preceding the date of the presentation of his petition, when unable to pay his debts as they became due, given an unfair preference to some of his creditors ;

(h) that the insolvent has concealed or removed his property or part thereof and has been guilty of fraud and fraudulent breach of trust.

Your petitioner therefore humbly prays that the insolvent's application for discharge be rejected with costs.

And your petitioner shall

Form No. 16.

Petition under Sec. 53 for avoidance of a voluntary transfer.

In the Court of

Insolvency Case No. of
The humble petition of A. B., the Receiver
appointed in the above case

RESPECTFULLY SHEWETH :

1. That C. D. of presented an application in the Court on the day of for being declared an insolvent and the said C. D. was adjudged insolvent by the Court by an order dated day of and your petitioner was appointed Receiver in the above case.

2. That the said insolvent C. D. has executed the following deeds of transfer in respect of his property on particularly mentioned in Schedule A. annexed herewith.

3. That the said C. D. was declared insolvent within two years after the date of the said transfers.

4. That the said transfers not having been made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration are void as against your petitioner.

Your petitioner therefore humbly prays that the Court may be pleased to declare the said transfers void as against your petitioner and to annul the same.

And your petitioner shall

N.B.—Schedule A. should specially state date of transfer, names of the transferor and transferee, date of presentation of the application and date of adjudication.

Form No. 17.

Petition under Sec. 54 for avoidance of fraudulent preference.

In the Court of

Insolvency Case No. of

In the matter of A. B., an Insolvent.

The humble petition of C. D. the Receiver appointed in the above case.

RESPECTFULLY SHEWETH:

1. That A. B. of has been adjudged insolvent on the
day of on a petition presented on the
day of

2. That the said insolvent A. B. has executed the following transfers (or made payments &c. *vide* Sec. 54) particularly set forth in Schedule A. herewith annexed on dates and in favour of persons particularly mentioned therein.

3. That the persons in whose favour the said deeds are executed (or payments made) are creditors to the said insolvent and the said insolvent being unable to pay his debts to the said creditors as they became due from his own money has executed the said deeds of transfer (or made payments &c.) with a view to giving these creditors preference over the other creditors.

334 PROVINCIAL INSOLVENCY ACT, 1920.

4. That the said transfers (or payments &c.) having been made within three months from the date of the presentation of the application are fraudulent and void as against your petitioner.

Your petitioner therefore humbly prays that the Court may be pleased to annul the same under the provision of Sec. 54 of Act V. of 1920.

And your petitioner shall

N.B.—Schedule A should specially state all the items required to be stated in Form 16.

Form No. 18.

Application for Prosecution under Sec. 69.

In the Court of

Insolvency Case No. of

In the matter of A. B., an Insolvent.

The humble petition of C. D. the Receiver appointed
in the above case.

RESPECTFULLY SHEWETH:

1. That after the appointment of your petitioner as Receiver your petitioner called upon A. B. the said insolvent to produce before him all books of account and furnish him with correct inventories of his property and list of his creditors and to attend before him for examination in respect of his property or creditors

2. That the said insolvent A. B. wilfully failed to perform the duties imposed upon him as stated above and failed to deliver up possession of the property mentioned in Schedule A. hereto annexed which is divisible amongst his creditors and which is for the time being in his possession or under his control, to your petitioner or Receiver.

Or

3. That the said insolvent A. B. fraudulently with intent to conceal the state of his affairs and to prevent equal distribution of his property amongst the general body of his creditors,

(i) has destroyed or otherwise wilfully prevented or purposely withheld the production of his day books, ledgers, cash books, order registers, diaries, &c. (or any other documents) relating to his estate which are subject to investigation under the Act, Or

- (ii) has kept or caused to be kept false books, of accounts, Or
 (iii) has made false entries in or withheld entries from or
 wilfully altered or falsified his books of account relating
 to his business, Or,

4. That the said insolvent with intent to diminish the sum to be divided amongst his creditors or to give preference among his creditors.

(i) has discharged or concealed the following debts due to or from him,

(ii) has charged, mortgaged or concealed property mentioned in Schedule B. annexed herewith.

Your petitioner therefore humbly prays that A. B. the said insolvent may be dealt with under Sec. 69 of Act V. of 1920.

And your petitioner shall

Form No. 19.

Memorandum of Appeal under Sec. 75 against order annulling a voluntary transfer, under Sec. 53.

In the Court of the District Judge of
 (In its Insolvency Jurisdiction)

A. B. of , Appellant

versus

C. D. of Receiver, Respondent.

The appellant, above-named, being dissatisfied with the order of the Subordinate Judge of . dated the . passed in its insolvency jurisdiction in Insolvency Case No. . of . begs to prefer this appeal from the said order on the following amongst other grounds:—

GROUND.

1. For that the learned Judge has erred in law in throwing the onus of proof that the appellant is a purchaser in good faith and for valuable consideration upon the appellant.

2. For that the learned Judge should have held that it was upon the Receiver to prove want of *bona fides* and valuable consideration before he could succeed on his petition for annulment of the transfers in favour of the appellant which were voidable and not void.

3. For that the learned Judge should have held on the evidence placed before him that the appellant was a purchaser in good faith and for valuable consideration.

4. For that, the learned Judge is wrong in his conclusion that the appellant is not a *bona fide* purchaser for valuable consideration.

5. For that upon the facts and circumstances of the case the learned Judge should not have annulled the transfer.

I certify that I have carefully examined the records of the case, and in my opinion there are good grounds of appeal as set forth above and having prepared them I undertake to appear and support the appeal before the appellate Court at the time of hearing.

Pleader.

Form No. 20.

Petition for leave to appeal under Sec. 75 (3).

In the Court of the District Judge of

Insolvency Case No. _____ **of** _____

The humble petition of A. B. the insolvent in the above case

RESPECTFULLY SHEWETH :

1. That your petitioner applied for annulment of the order of adjudication passed upon your petitioner by this Court on the ground that the debts of your petitioner have been paid in full.

2. That the Court by its order dated _____ has dismissed the application of your petitioner on the ground that the payment of annas four in the rupee in full satisfaction to all his creditors is not payment in full.

3. That your petitioner is seriously aggrieved with the said order and intends to prefer an appeal to the Hon'ble High Court against the said order.

4. That your petitioner is advised and submits that the matter involves a question of law and is a fit case for appeal.

In the above circumstances your petitioner humbly prays that the Court will be pleased to grant him leave to appeal against the aforesaid order.

And for this your petitioner shall.

CALCUTTA HIGH COURT.

NEW PROVINCIAL INSOLVENCY RULES.

Published in the Calcutta Gazette, dated 8th June 1921.

1. The following rules may be cited as "The Provincial Insol-Framed under Section vency Rules." The forms prescribed by 79 Act V of 1920 these rules, with such variations as circumstances may require, shall be used for the matters to which they severally relate.

(The forms are produced as Civil Process Forms No. 137 to 150 in Volume II.)

2. Every insolvency petition shall be entered in the Register of Insolvency Jurisdiction, and shall be given a serial number in that Register, and all subsequent proceedings in the same matter shall bear the same number.

3. All insolvency proceedings may be inspected at such times, and subject to such restrictions as the District Judge may prescribe, by the Receiver, the debtor, and any creditor who has proved, or any legal representative on their behalf.

Notices.

4. Whenever publication of any notice or other matter is required by the Act or these Rules to be made in an official Gazette, a memorandum referring to and giving the date on which such advertisement appeared shall be filed with the record and noted in the order-sheet.

5. Notice of an order fixing the date of the hearing of a petition under Section 19 (2) shall be published in the local official Gazette and advertised in such newspapers as the Court may direct. A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition. The same procedure shall be followed in respect of notices of the date for the consideration of a proposal for composition or scheme of arrangement under Section 38 (1).

6. Notice of an order of adjudication under Section 30 may, in addition to the publication in the local official Gazette required by the Act, be published in such newspapers as the Court may direct.

When the debtor is a Government servant, a copy of the order shall be sent to the head of the office in which he is employed. The same procedure shall be followed in regard to notices of orders annulling an adjudication under Section 37 (2).

7. The notice to be given by the Court under section 50 shall be served on the creditor or his pleader, or shall be sent through the post by registered letter.

8. The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter.

9. Notices of the date of hearing of applications for discharge under Section 41 (1) shall be published in the local official Gazette and in such newspapers as the Judge may direct, and copies shall be sent by registered post to all creditors whether they have proved or not.

10. A certificate of an officer of the Court or of the Official Receiver, or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the Post Office receipt shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

11. In addition to the prescribed methods of publication, any notice may be published otherwise in such manner as the Court may direct, for instance, by affixing copies in the Court-house or by beat of drum in the village in which the insolvent resides,

Receivers.

12. Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court should be served on the debtor, and forwarded to the person appointed.

13. (1) A Court when fixing the remuneration of a Receiver should, as a rule, direct it to be in the nature of a commission or percentage of which one part should be payable on the amount realised, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends.

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors.

14. The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court, and shall be paid out of the estate.

15. Any creditor who has proved his debt may apply to the Court for a copy of the Receiver's Accounts (or any part thereof) relating to the estate, as shown by the cash-book up to date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies.

16. In any case in which the debtor proposes a composition or scheme under Section 38, the Receiver shall give seven day's notice to the debtor and to every creditor of the time and place appointed for such meeting. Such notices shall be served by registered post.

Proof of Debts.

17. A creditor's proofs should be in Civil Process Form No. 146, in Volume II, with such variations, as circumstances may require.

18. In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other persons on behalf of all such creditors. Such proof should be in Civil Process Form No. 147 in Volume II.

Procedure where the Debtor is a Firm.

19. Where any notice, declaration, petition, or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, e.g., "Brown & Co. by James Green, a partner in the said firm."

20. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

21. The provision of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

22. Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

23. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

24. In cases of partnership the debtors shall submit a schedule of his separate affairs.

25. The joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

26. Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

27. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Sale of Immoveable Property of Insolvent.

28. If no Receiver is appointed and the Court, in exercise of its powers under Section 58 of the Act, sells any immoveable property of the insolvent, the deed of sale of the said property shall be prepared by the purchaser at his own cost, and shall be signed by

the Presiding Officer of the Court. The cost of registration (if any) will also be borne by the purchaser.

Dividends.

29. The amount of the dividend may, at the request and risk of a creditor, be transmitted to him by post.

Summary Administration.

30. When an estate is ordered to be administered in a summary manner under Section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely:—

- (i) There shall be no advertisement of any proceedings in the Local Official Gazette or in any newspaper.
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case."
- (iii) The notice of the hearing of the petition to the creditors shall be in Civil Process Form No. 150 in Volume II.
- (iv) The Court shall examine the debtor as to his affairs, but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.
- (v) The appointment of a Receiver will often not be necessary, and the Court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Cost.

31. All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the reasonable costs of the petitioning creditor shall be payable out of the estate.

32. No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate, if the Court refuses to approve the composition or scheme.

II.—*Cancel Civil Process Forms Nos. 137-150 at pages 417 to 426, Volume II, of the Court's General Rules and Circular Orders, Civil, and substitute thereof the following:—*

CIVIL PROCESS No. 137.

DEBTOR'S PETITION.

[Section 13 of the Provincial Insolvency Act, V of 1920.]

District

342 PROVINCIAL INSOLVENCY ACT, 1920.

In the Court of the District Judge at
Petitioner.

I (a) ordinarily residing at (or "carrying on business at," "or personally working for gain at," or address and description "in custody at") in consequence of of debtor.

(b) State name of the order of (b) being unable to pay my Court and particulars of decree in respect of debts, hereby petition that I may be adjudged of which the order of detention has been made an insolvent. The total amount of all pecu- or by which an order niary claims against me is Rs. of attachment has been made against debtor's property.

(c) as set out in detail in Schedule A annexed hereunto, which contains the names and residences of all my creditors so far as they are known to, or can be ascertained by me.

(c) State whether, The amount and particulars of all my property are set out in Schedule B annexed hereunto together with a specification of all my property, not consisting of money, and the place or places at which such property is to be found and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree.

I have not on any previous occasion filed a petition to be adjudged an insolvent, or, I set out in Schedule C particulars (d) relating to

(d) The particulars my previous petition to be adjudged an required are insolvent.

(i) Where a petition has been dismissed reasons for such dismissal

(ii) Where a debtor has previously been adjudged an insolvent concise particulars of the insolvency including a statement whether any previous adjudication has been annulled, and if so, the grounds there for

Verification clause as in plaints.

Signature

CIVIL PROCESS No. 138.

NOTICE TO CREDITORS OF THE DATE OF HEARING OF AN INSOLVENCY
PETITION.

[Section 19 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

Insolvency Application No. of 19 .

Whereas A. B. has applied to this Court by a petition, dated of 19 , to be declared an insolvent under the Provincial Insolvency Act, V of 1920, and your name appears in the list of creditors filed by the aforesaid debtor, this is to give you notice that the Court has fixed the day of for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter you should attend in person or by duly instructed pleader. The particulars of the debt alleged in the petition to be due to you, are as follows.

Judge.

Form on the reverse as in C. P. Form No. 1, ante.

CIVIL PROCESS No. 139.

ORDER OF ADJUDICATION.

[Section 27 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

Insolvency Application No. of 19.

Pursuant to a petition, dated against [here insert name, description, and address of debtor] and on the application of [here insert " the Official Receiver" or "the debtor himself" or "A. B. of a creditor,"] and on reading and hearing it is ordered that the debtor be and the said debtor is hereby adjudged insolvent.

It is further ordered that the debtor do apply for his discharge within from this date.

Dated this day of 19 .

Judge

CIVIL PROCESS No. 140.

NOTICE OF APPLICATION BY UNSCHEDULED CREDITOR.

[Section 33 (3) Act V of 1920.]

In the Court of District Judge at

In the matter of

an Insolvent

No. of 19 .

Judge.

CIVIL PROCESS No. 144.

NOTICE TO CREDITORS OF APPLICATION FOR DISCHARGE.

[Section 41 (1) of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at
Insolvency case No. of 19 .

Applicant.

Take notice that the abovenamed insolvent has applied at the Court for his discharge, and that the Court has fixed the day of 19 at o'clock for hearing the application.

Dated this day of 19 .

Note.—On the back of this notice the provisions of section 42 (1), Act V of 1920, should be printed.

Form on the reverse as in C. P. Form No. 1, *ante*.

CIVIL PROCESS No. 145.

**ORDER OF DISCHARGE SUBJECT TO CONDITIONS AS TO EARNINGS,
AFTER-ACQUIRED PROPERTY, AND INCOME.**

[Section 41 (2) (a) (b) or (c) of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at
Insolvency case No. of 19 .

Applicant.

On the application of , adjudged insolvent on the day of 19 , and upon taking into consideration the report of the Official Receiver (or Receiver) as to the insolvent's conduct and affairs, and hearing A. B. and C. D. creditors :—

It is ordered that the insolvent (a) be discharged forthwith; or (b) be discharged on the , or (c) be discharged subject to the following conditions as to his future earnings, after-acquired property, and income:—

After setting aside out of the insolvent's earnings, after-acquired property, and income, the yearly sum of Rs. for the support of himself and his family, the insolvent shall pay the surplus, if any (or such portion of such surplus as the Court determine), of such earnings, after-acquired property, and income to the Court or Official Receiver (or Receiver) for distribution among the creditors in the insolvency. An account shall on the first day of January in every year, or within fourteen days thereafter, be filed in these proceedings.

Dated this day of 19 .

PROOF OF DEBT : GENERAL FORM.

Insolvency Application No. _____ of 19 ____.

(a) Here insert number given in the notice of (b) In the matter of No. (a) of 19 .
make oath and say (or solemnly

1. That the said ~~was~~^{were}, at the date of the petition, viz., the day of 19 and still justly and truly indebted to me in the sum of Rs. a. p for (c) as shown by

(d) Here details of securities bills or the like for use had or received any manner of satisfaction or security whatsoever save and except the following (d).

Admitted to vote for Rs.	} this	Sworn at	} Deponent's
		day of		Signature.
Judge or Official Receiver.	} before me		

CIVIL PROCESS No. 147.

PROOF OF DEBT OF WORKMEN.

[Section 49 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at
Insolvency Application No. of 19 .

I (a) of (b) make oath and say :—(or solemnly and sincerely affirm and declare).

(a) Fill in full name, address and, occupation of deponent.

(b) The abovenamed debtor or the foreman of the abovenamed debtor or on behalf of the workmen and others employed by the abovenamed debtor.

(c) "I" or "the said"

(d) "My employ" or "the employ of the abovenamed debtor."

respectively to (e) during such periods before the date of the receiving order as are set out against their respective names in the fifth column of such schedule, for which said sums or any part thereof, I say that they have not, nor hath any of them had or received any manner of satisfaction or security whatsoever.

Judge or Official Receiver.

Admitted to vote for Rs.

1. That (c) ^{was}~~were~~ at the date of the adjudication, viz., the day of 19 .

and still ^{am}~~are~~ justly and truly indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or others in (d) in respect of services rendered by them

Sworn at

this

day of

before me

Deponent's

Signature.

Commissioner.

CIVIL PROCESS No. 148.

ORDER APPOINTING A RECEIVER.

[Section 56 of the Provincial Insolvency Act, Y of 1920.]

In the Court of the District Judge at

In the matter of

an Insolvent.

No.

of

19 .

Whereas A. B., was adjudicated an insolvent by order of this Court, dated , and it appears to the Court that the appointment of a Receiver for the property of the insolvent is necessary :—

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and A. B.

of [or the Official Receiver] is hereby constituted Receiver of the property of the said insolvent.

And it is further ordered that the said Receiver (not being the Official Receiver) do give security to the extent of and that his remuneration be fixed at

Dated

Judge.

**NOTICE TO PERSONS CLAIMING TO BE CREDITORS OF INTENTION TO
DECLARE FINAL DIVIDEND.**

In the Court of the District Judge at

In the matter of Insolvency Application No. of 19 .
Applicant.

Dated this day of 19 .

To X. Y. **Receiver. [Address.]**

CIVIL PROCESS No. 150.

SUMMARY ADMINISTRATION NOTICE TO CREDITORS.

[Section 74 of the Provincial Insolvency Act, V of 1920.]

In the Court of the District Judge at

Insolvency case No. **of 19** **Applicant.**

Take notice that on the _____ day of _____ 19____, the above-named debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the _____ day of _____ 19____, the Court being satisfied that the property of the debtor is not likely to exceed Rs. 500, directed that the debtor's estate be administered in a summary manner and appointed the _____ day of _____ 19____, for the further hearing of the said petition and examination of the said debtor.

Also take notice that the Court may on the aforesaid date then and there proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on that date. Proof of any claim you desire to make must be lodged in Court on or before that date.

Given under my hand and the seal of this Court this
day of 19 . Judge.

ALLAHABAD HIGH COURT NEW RULES, 1922.

Rules framed under Sec. 79 of the Provincial Insolvency Act, V of 1920.

Published in the Allahabad Gazette dated the 22nd April, 1922.

The following amendments are made in the General Rules (Civil) of 1911, with the previous approval of Government as required by section 79 of the Provincial Insolvency Act V of 1920 :—

For the rules in Chapter XIX substitute the following rules :—

1. These rules may be cited as “The Agra Provincial Insolvency Rules.” The forms Nos. 138 to 152 (shown in Volume II, Appendices) with such variations as circumstances may require shall be used for the matters to which they severally relate.

2. Every insolvency petition shall be entered in the Register of Insolvency Petitions (Form No. 80) to be maintained in all courts exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number.

3. All insolvency proceedings may be inspected by the Receiver, the debtor, and any creditor who has tendered proof of his debts, or any legal representative on their behalf at such times and subject to the same rules as other court records.

Notices.

4. Whenever publication of any notice or other matter is required by the Act to be made in an official gazette, or is required by the rules framed under the Act to be made in a local newspaper, a memorandum referring to and giving the date of such advertisement shall be filed with the record and noted in the order sheet.

5. Notice of an order fixing the date of the hearing of a petition under section 19 (2) shall, in addition to the publication thereof in the local official gazette as required by the Act, be also advertised in such newspaper or newspapers as the court may direct.

A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition. The same procedure shall be followed in respect of notices of the date for consideration of a proposal for composition or scheme of arrangement under section 38 (1).

6. Notice of an order of adjudication under section 30 which is required by the Act to be published in the local official gazette shall

also be published in such local newspaper or newspapers as the court may think fit. When the debtor is a Government servant, a copy of the order shall be sent to the Head of the office in which he is employed.

The same procedure shall be followed in regard to notices or orders annulling an adjudication under section 37 (2).

7. The notice to be given by the court under section 50 shall be served on the creditor or his pleader or shall be sent through the post by registered letter.

8. The notice to be issued by the Receiver under section 64 before the declaration of a final dividend to the persons whose claims to be creditors have been notified, but not proved, shall be sent through the post by registered letter.

9. Notices of the date of hearing of applications for discharge under section 41 (1) shall be published in the local official gazette and in such local newspapers as the Judge may direct and copies shall be sent by registered post to all creditors whether they have proved or not.

10. A certificate of an officer of the court or of the Official Receiver or an affidavit by a Receiver that any of the notices referred to in the preceding rules has been duly posted accompanied by the post office receipt, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

11. In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the court may direct, for instance by affixing copies in the court-house or by beat of drum in the village in which the insolvent resides.

Receivers.

12. Every appointment of a Receiver shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the court shall be served on the debtor, and forwarded to the person appointed.

13. (a) A court when fixing the remuneration of a Receiver shall as a rule direct it to be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividends.

(b) When a Receiver realizes the security of a secured creditor the court may direct additional remuneration to be paid to him with

reference to the amount of work done by him and the benefit resulting therefrom to the creditors.

14. The Receiver shall keep a cash book and such books and other papers as to give a correct view of his administration of the estate, and shall submit his accounts in such forms as the court may direct. Such accounts shall be audited by such person or persons as the court may direct. The costs of the audit shall be fixed by the court and shall be paid out of the estate.

15. The Receiver shall ordinarily deposit the money realized by him in the Government Treasury or whenever for any particular reason any money in any case is placed in a bank approved by the court in fixed deposit bearing interest, the amount of interest shall be credited to the estate.

16. The Receiver shall *submit* to the court each quarter not later than the 10th day of the month next succeeding the quarter to which it relates, an account showing all the receipts and disbursements in the case or cases in which he is Receiver.

17. Whenever there are no funds in the estate and the Receiver receives financial help from any creditor he should show in the accounts of the estate the amount so received.

18. Any creditor who has proved his debt may apply to the court for a copy of the Receiver's accounts (or any part thereof) relating to the estate, as shown by the cash book up to date, and shall be entitled to such copy on payment of the charges laid down in the rules of this Court regarding the grant of copies. No court-fee will be required for such copies.

19. In any case in which a meeting of creditors is necessary and in any case in which the debtor proposes a composition or scheme under section 38, the Receiver shall give at least 14 days' notice to the debtor and to every creditor of the time and place appointed for each meeting. Such notices shall be served by registered post.

Proof of debts.

20. A creditor's proof may be in form No. 143 in the Appendix with such variations as circumstances may require.

21. In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor or by some other person on behalf of all such creditors. Such proof should be in Form No. 144 in the Appendix.

Procedure where the debtor is a firm.

22. Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm shall also add his own signature, e.g. "Brown & Co., by James Green, a partner in the said firm."

23. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the court upon partners, or upon any person having at the time of service the control or management of the partnership business there.

24. The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style- other than his own.

25. Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm's name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.

26. An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

27. In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs.

28. The joint creditors, and each set of separate creditors may severally accept compositions or schemes of arrangements. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted.

29. Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposal may vary in character and amount. Where a composition or scheme

is approved the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

30. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Applications and notices.

31. (a) Every application to the court either by the Receiver or by any creditor, or by any person either claiming to be entitled to any alleged assets of the debtor, or complaining of any act of the Receiver, and in particular, and without prejudice to the generality of this rule, for an order deciding any question under sections 4, 51, 52, 53, 54 and 55 or any one of them, shall (unless otherwise provided by these rules, or unless the court shall in any particular case otherwise direct) be made by application in writing and shall be supported by an affidavit by the applicant.

(b) Every such application shall state in substance the nature of the order or relief applied for, the section of the Act under which such application is made the grounds upon which such order or relief is claimed, and the sections of any other Act relied upon.

(c) Every such application shall also state whether the applicant desires or intends to call witnesses at the hearing in support thereof and shall specify with precise identification the documents upon which the applicant intends to rely.

(d) Where such application is made by an applicant other than the Receiver, a copy of such application, and a copy of the affidavit in support thereof shall be served upon the Receiver, together with copies of the documents upon which the applicant intends to rely as mentioned in sub-section (c) hereof, unless the number or volume of such document is exceptionally great in which case notice of the fact shall be given to the Receiver, and an opportunity shall be afforded to the Receiver of examining the originals seven clear days at least before the hearing.

(e) Where such application is made by the Receiver, the affidavit in support thereof shall identify any statement of the debtor made to

the Receiver, which is either on the file or in the Receiver's possession and on which the Receiver intends to rely.

(f) Any party to the application shall be entitled to inspect the original of any document which has been either filed, or mentioned in the affidavit made in support of such application, or of which any copy has been exhibited to such affidavit.

(g) A copy of every application mentioned in sub-section (a) hereof, and of the affidavit in support of such application shall be served upon the Receiver whether or not any relief or order is expressly claimed against him.

Sale of immoveable property of insolvent.

32. (If no Receiver is appointed and the court, in exercise of its powers under section 58 of the Act, sells any immoveable property of the insolvent the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall be signed by the presiding officer of the court. The cost of registration [if any] will also be borne by the purchaser.)

Dividends.

33. The amount of the dividend may at the request and risk of the creditor be transmitted to him by post.

Summary Administration.

34. When an estate is ordered to be administered in a summary manner under section 74 of the Act, the provisions of the Act and Rules shall, subject to any special direction of the Court, be modified as follows, namely :—

- (i) There shall be no advertisement of any proceeding in the official gazette or a local paper.
- (ii) The petition and all subsequent proceedings shall be endorsed "summary case."
- (iii) The notice of the hearing of the petition to the creditors shall be in Form No. 151 in the Appendix.
- (iv) The court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.
- (v) The appointment of a Receiver will often not be necessary and the court may act under section 58 of the Act in order to reduce the cost of the proceedings.

Costs.

35. All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same, but when an order of adjudication has been made, the costs of the petitioning creditor shall be taxed and be payable out of the estate.

36. No costs incurred by a debtor of, or incidental to, an application to approve of a composition or scheme, shall be allowed out of the estate if the court refused to approve the composition or scheme.

37. Where an order of adjudication is made on a debtor's petition, and the court is satisfied that the debtor is unable to pay the cost of publication in the local official gazette, of the notice required by section 30 of the Act, the court shall direct that such cost be met from the sale proceeds of the property of the insolvent. If the insolvent has no property, or if the sale proceeds are insufficient, such cost or the irrecoverable balance thereof shall be remitted.

THE MADRAS PROVINCIAL INSOLVENCY RULES, 1922.

[Notification published in the "Fort St. George Gazette" of the 25th April 1922.]

By virtue of the provisions of section 79 of the Provincial Insolvency Act, 1920, and of all other powers thereunto enabling, and with the previous sanction of His Excellency the Governor in Council, the High Court of Judicature at Madras has made the following rules for carrying into effect the provisions of the said Act:—

1. These Rules may be called "The Madras Provincial Insolvency Rules, 1922," and shall apply to all proceedings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Madras. They shall come into force on the first day of May 1922 and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

II. The forms mentioned in these Rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

III. (1) In these Rules, unless there is anything repugnant in the subject or context, "the Act" means the Provincial Insolvency Act, 1920;

"the Court" includes a Receiver when exercising the powers of the Court in accordance with section 80 of the Act;

"Receiver" means a Receiver appointed by the Court under section 56 (1) of the Act;

"Interim Receiver" means a Receiver appointed by the Court under section 20 of the Act;

"proved debt" means the claim of a creditor so far as it has been admitted by the Court.

(2) Save as otherwise provided all words and expressions used in these Rules shall have the same meaning as those assigned to them in the Act.

IV. (1) Every petition, application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause-title in Form No. 1.

(2) When an insolvency petition is admitted, the chief ministerial officer of the Court shall assign a distinctive serial number to the

petition and all subsequent proceedings on the petition shall bear that number.

V. (1) When an insolvency petition presented by a creditor is

Creditor, to furnish admitted, the creditor shall within seven copies of his petition days thereafter furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct.

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served.

VI. The particulars to be given under Particulars in debtor's petition. section 13 (1) of the Act shall be in Form No. 2.

VII. If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in the manner provided for the service of summons.

VIII. (1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No. 3 in the manner provided in section 49 of the Act, provided Proof of debts. that before admitting any claim the Court may call for further evidence.

(2) The affidavit may be made by the creditor or by some person authorized by him, provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge.

(3) As soon as may be after proof of any debt is tendered, the Court shall by order in writing admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection.

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order.

IX. As soon as the schedule of creditors has been framed a copy thereof shall, if a Receiver or *Interim Receiver* has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the Receiver or *Interim Receiver*.

X. (1) If a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved.

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court.

XI. (1) Every appointment of a Receiver or *Interim Receiver* shall be by order in writing signed by the Court. Copies of this order sealed with the seal of the Court shall be served on the debtor and forwarded to the person appointed.

(2) Every Receiver or *Interim Receiver* other than an Official Receiver shall be required to give such security as the Court thinks fit.

(3) The Court shall not require an Official Receiver to give security.

(4) In cases where the Official Receiver is empowered to make orders of adjudication, he shall send a copy of every order of adjudication made by him to the Court in which the proceedings are pending and may apply that he may be appointed Receiver for the property of the insolvent.

(5) The Court may thereupon appoint the Official Receiver to be receiver for the property of the insolvent and, unless it sees fit to do so, it shall not be necessary to give notice of the application to any person.

Provided that any party to the proceedings may apply to the Court, upon notice to the Official Receiver and the insolvent, that the appointment of the Official Receiver may be set aside or that a special receiver may be appointed in his place.

XII. (1) The Court may remove or discharge any Receiver or *Interim Receiver* other than an Official Receiver, and any Receiver or *Interim Receiver*.

Receiver so removed or discharged shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct.

(2) If an order of adjudication is annulled, the Receiver (if any) shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct.

XIII. Every Receiver or *Interim Receiver* shall be deemed for the purpose of the Act and of these rules to be an officer of the Court.

XIV. (1) Every application to the Court made by a Receiver or an *Interim Receiver* shall be in writing.

Applications by Receiver or *Interim Receiver*.

(2) The Court may order that notice of any application by the Receiver or *Interim Receiver* and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved.

XV. (1) The remuneration of Receivers or *Interim Receivers* other than Official Receivers shall be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed five *per centum* of the amount of the dividends.

(2) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under section 38 (7) of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof.

XVI. (1) Unless the Court otherwise directs the Receiver or *Interim Receiver* shall as soon as may be after his appointment, and in any case before the hearing of the debtor's application for discharge draw up a report upon the cause of the debtor's insolvency, the conduct of the debtor so far as it may have contributed to his insolvency and also his conduct during the insolvency proceedings in all matters connected with

Receiver's report.

such proceedings, and in particular such report shall state (a) whether the value of the debtor's assets is less than half his unsecured liabilities and, if so, whether that fact is due to circumstances for which the debtor cannot justly be held responsible, (b) whether the debtor has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency, (c) whether the debtor has continued to trade after knowing himself to be insolvent, (d) whether the debtor has contracted any debt provable under the Act without having at the time of contracting it any reasonable or probable ground of expectation that he would be able to pay it, (e) whether the debtor has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities, (f) whether the debtor has brought on, or contributed to, his insolvency by rash and hazardous speculations or by unjustifiable extravagance in living or by gambling or by culpable neglect of his business affairs, (g) whether the debtor has within three months preceding the date of the presentation of the petition when unable to pay his debts as they became due given an undue preference to any of his creditors, (h) whether the debtor has on any previous occasion been adjudged an insolvent or made a composition or arrangement with his creditor, and (i) whether the debtor has concealed or removed his property or any part of it or has been guilty of any other fraud or fraudulent breach of trust.

(2) If the debtor submits a proposal under section 38 (1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

XVII. Unless the Court otherwise directs, the debtor shall

Debtor to furnish furnish the Receiver or *Interim* Receiver or,
accounts. if a Receiver or *Interim* Receiver has not

been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtors or on his account and his income and the source thereof for such period as the Receiver or *Interim* Receiver or, if a Receiver or *Interim* Receiver has not been appointed, the Court may direct, provided that the Receiver or *Interim* Receiver shall not, without the previous sanction of the Court, direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition.

XVIII. (1) The Receiver or *Interim* Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) The accounts of Official Receivers shall be audited annually by the Accountant-General.

(3) The cost of such audit, calculated at 12 annas per Rupees one hundred on the amount realized since the last audit of the estate concerned, shall be paid by the Official Receiver from such amount and, in case a distribution thereof to creditors is ordered in any year before the audit has taken place, shall be reserved for such payment from the amount otherwise available for distribution.

XIX. (1) No dividend shall be distributed by a Receiver without the previous sanction of the Court.

(2) Notice in Form No. 8 or Form No. 9, as may be appropriate, that the distribution of a dividend has been sanctioned shall be sent by the Receiver or, if there is no Receiver, by the Court to every creditor, who has proved a debt, by registered post within one month from the date of the order sanctioning the distribution.

(3) The amount of any dividend due to a creditor may at his request be transmitted to him by postal money order at his risk and expense and, if the amount does not exceed Rs. 5, shall be so transmitted, unless he appears to claim it in person or by duly authorized agent before the Receiver or, if there is no Receiver, before the Court within two months from the date of the order sanctioning the distribution of the dividend.

(4) An order shall not be made under section 65 of the Act without giving the Receiver opportunity to show cause why the order should not be made.

XX. (1) An application for discharge shall not be heard until after the schedule of creditors has been framed.

(2) Every creditor who has proved shall be entitled in person or by pleader to appear at the hearing and oppose the discharge, provided that he has served upon the insolvent and upon the Receiver (if

any) not less than seven days before the date fixed for the hearing a notice stating the grounds of his opposition to the discharge.

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor; and a creditor who has served the prescribed notices shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice.

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by pleader, and any creditor, in person or by pleader, who has served the prescribed notice.

XXI. (1) The notices to be given under sections 19 (2), 30, 37 (2), 38 (1) and 41 (1) of the Act shall be published

Notices.

in the *Fort St. George Gazette* in English, in the District Gazette in English and in the language of the Court and in such other manner, if any, as the Court may direct, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(2) The notices to be given under sections 19 (2), 38 (1), and 41 (1) of the Act shall be published and affixed in the manner provided in paragraph (1) of this rule not less than fourteen days before the date fixed for the hearing of the application, the consideration of the proposal, or the hearing of the application for discharge as the case may be.

(3) Notice of the date fixed for the hearing of an insolvency petition under section 19 (1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, not less than fourteen days before the said date.

(4) The notice to be given under section 33 (3) of the Act shall be served only on the debtor and on the creditors who have proved their debts and may, if the Court so directs, be served on any or all such creditors by registered post.

(5) Notice of the date fixed for the consideration of a proposal under section 38 (1) of the Act shall be sent by the Court by registered

post to all creditors who have tendered proof of their debts not less than fourteen days before the said date.

(6) Notice of the date fixed for the hearing of an application for discharge under section 41 (1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the schedule of creditors not less than fourteen days before the said date.

(7) The notice to be given under section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims.

(8) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned.

(9) The notice of an order of adjudication to be published under section 30 of the Act shall contain a statement that creditors should prove their claims as soon as possible and that a claim may be proved by delivering or sending by registered post to the Court or Official Receiver, as the case may be, an affidavit in Form No. 3.

XXII. (1) All proceedings under the Act down to and including the making of an order of adjudication shall

Costs.

be at the cost of the party prosecuting them; but when an order of adjudication has been made, the costs of the petitioning creditor including the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the petitioning creditor is required to pay shall be taxed and be payable out of the estate.

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition and the costs of the publication of all Gazette notices required by the Act or Rules which, by the Act or Rules, the debtor is required to pay.

(3) The cost of the publication in the Gazette:

(a) An order fixing the date for the hearing of an insolvency petition under section 19 (2) shall, when the petition is by the creditor, be paid by the creditor, and, when the petition is by debtor, be paid out of the sum deposited in Court by the debtor under rule XXII (2).

(b) Notice of a proposal for a composition under section 38 (1) and notice of an application for discharge under section 41 (1) shall be paid by the debtor.

(4) The publication in the Gazette of—

(a) Notice of adjudication under section 30,

(b) Notice to creditors whose claims have been notified but not proved under section 64,

(c) Notice of an order annulling an adjudication under section 31 shall be free of charge.

(5) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate if the Court refuses to approve the composition or scheme.

(6) If the assets available are not sufficient in any case for taking proceedings necessary for the administration of the estate, the Receiver or *Interim* Receiver or Official Receiver, as the case may be, may call upon the creditors or any of them to advance the necessary funds, or to indemnify him against the cost of such proceedings. Any assets realized by such proceedings shall be applied, in the first place, towards the repayment of such advances, with interest thereon at 6 per cent. per annum.

Summary administration. **XXIII.**—If the Court makes an order under section 74 of the Act that the debtor's estate be administered in a summary manner—

(a) the petition and all subsequent proceedings shall be endorsed "Summary Case";

(b) the Receiver or *Interim* Receiver shall not carry on the business of the debtor under clause (c) of section 59 of the Act, nor institute any suit under clause (d) of the said section, nor accept as the consideration for the sale of any property of the debtor a sum of money payable at a future time under clause (f), nor mortgage nor pledge any part of the property of the debtor under clause (g).

XXIV. All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver or *Interim* Receiver, the debtor, any creditor who has proved or any legal representative on their behalf.

XXV. All Courts and Official Receivers shall maintain registers of (1) insolvency petitions received, (2) insolvency petitions disposed of, and (3) pro-

Maintenance of registers.

366 PROVINCIAL INSOLVENCY ACT, 1920.

ceedings in insolvency subsequent to orders of adjudication in the Forms Nos. 4, 5 and 6 in the appendix to these rules. They shall also submit to the High Court on the 15th day after the close of each quarter a return of all proceedings in insolvency in Form No. 7.

XXVI. In addition to the registers prescribed in rule XXV, Maintenance of registers. Official Receivers shall maintain (i) a dividend register, (2) a register of assets and (3) a document register (inventory) in Forms Nos. 10, 11 and 12 appended to these rules.

XXVII. Expenditure incurred by an Official Receiver and his staff on journeys undertaken for the purpose of administration will be recoverable by the Official Receiver from the assets of the estates or estates concerned in accordance with the rules made by the High Court from time to time on that behalf.

XXVIII. (1) When any petition, notice or other document is signed by a firm of creditors or debtors in the Proceedings by or against a firm. the firm's name, the partner signing for the firm shall add also his signature in the following manner, "B and Co., by A. B. a partner in the said firm."

(2) Any petition or notice of which personal service is necessary shall be deemed to be duly served on all members of the firm, if it is served at the place of business of the firm in India upon any one of the partners or upon any person having at the time of service the control or management of the partnership business there.

(3) When the firm of debtors file an insolvency petition, the same shall contain the names in full of the individual partners, and, unless it is signed by all of them, it shall be accompanied by the affidavit of the partner signing it that all the partners concur in the filing of the same.

(4) When a creditor files an insolvency petition against a firm, the same shall state the names of the individual partners so far as the same are known to the petitioner, and the debtors shall together with their schedule of affairs file an affidavit setting out the names in full of the individual partners.

(5) An order of adjudication shall be made against the partners individually.

(6) The debtors shall submit a schedule of their partnership affairs and each debtor shall submit a schedule of his separate affairs..

BY HIS MAJESTY'S HIGH COURT OF JUDICATURE
AT BOMBAY. APPELLATE SIDE.

THE BOMBAY PROVINCIAL INSOLVENCY
RULES, 1924.

No. 5730.—By virtue of the provisions of section 79 of the Provincial Insolvency Act. (V of 1920), and of all other powers thereunto enabling, the High Court of Judicature at Bombay, has with the previous sanction of His Excellency the Governor in Council, and in supersession of the Bombay Provincial Insolvency Rules, 1909, made the following rules for carrying into effect the provisions of the said Act:—

I.—The rules may be called “The Bombay Provincial Insolvency Rules, 1924,” and shall apply to all proceedings under the Provincial Insolvency Act, 1920, in any Court subordinate to the High Court of Judicature at Bombay. They shall come into force on the 1st day of December, 1924, and shall apply to all proceedings thereafter instituted and, as far as may be, to all proceedings then pending.

II.—The forms mentioned in these rules are the forms in the Appendix hereto and shall be used with such variations as circumstances may require.

III.—(1) In these rules unless there is anything repugnant in the subject or context.—

“the Act” means the Provincial Insolvency Act, V of 1920;

“the Court” includes a receiver when exercising the powers of the Court in accordance with section 80 of the Act;

“receiver” means a receiver appointed by the Court under section 56 (1) of the Act, and (except where the context otherwise requires) includes an Official Receiver;

“interim receiver” means receiver appointed by the Court under section 20 of the Act;

“proved debt” means the claim of a creditor so far as it has been admitted by the Court.

(2) Save as otherwise provided, all words and expressions used in these rules shall have the same meaning as those assigned to them in the Act.

Petitions.

IV.—(1) Every insolvency petition shall be entered in the Register of Insolvency Petitions to be maintained in Form No. 17 in all Courts

exercising insolvency jurisdiction and shall be given a serial number in that register and all subsequent proceedings in the same matter shall bear the same number.

(2) Every petition, application, affidavit or order in any proceeding under the Act or under these rules shall be headed by a cause-title in Form No. 1.

V.—(1) When an insolvency petition presented by a creditor is admitted, the creditor shall, within seven days thereafter, furnish a copy of the petition for service on the debtor or, if there are more debtors than one, as many copies as there are debtors, and the chief ministerial officer of the Court shall sign the copy or copies if on examination he finds them to be correct.

(2) The copy shall be served together with the notice of the order fixing the date for hearing the petition on the debtor or upon the person upon whom the Court orders notice to be served. Such notice may, in the discretion of the Court, require the debtor to file a schedule containing all the particulars mentioned in section 13 (d) and (e) within such time not being less than ten days from date of service of notice as the Court shall determine.

VI.—A debtor's petition shall be in Form No. 2 & a creditor's petition shall be in Form No. 3.

VII.—If a debtor against whom an insolvency petition has been admitted dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in a manner provided for the service of summons.

Proof of Debts.

VIII.—(1) Unless otherwise ordered, all claims shall be proved by affidavit in Form No. 7 in the manner provided in section 49 of the Act, provided that before admitting any claim the Court may call for further evidence.

(2) The affidavit may be made by the creditor or by some person authorised by him, provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge.

(3) As soon as may be after proof of any debt is tendered, the Court shall, by order in writing, admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection.

(4) A copy of every order rejecting a claim, or, admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order.

IX.—In any case in which it shall appear from the debtor's statement that there are numerous claims for wages by workmen and others employed by the debtor, it shall be sufficient if one proof for all such claims is made either by the debtor, or by some other person on behalf of all such creditors. Such proof should be in Form No. 8.

Schedule of Creditors.

X.—As soon as the schedule of creditors has been framed, a copy thereof shall, if a receiver has been appointed, be supplied to him, and all subsequent entries and alterations made therein shall be communicated to the receiver, except in cases where the Official Receiver himself frames such schedule under section 80.

Scheme.

XI.—(1) if a debtor submits a proposal under section 38 (1) of the Act, the Court shall fix a date for the consideration of the proposal, and notice thereof together with a copy of the terms of the proposal shall be sent to every creditor who has proved.

(2) At the meeting for the consideration of the proposal the debtor shall be entitled to address the Court in person or by pleader in support of the proposal, and every creditor who has proved shall be entitled in person or by pleader to question the debtor and to address the Court.

Receivers.

XII.—(1) Every receiver or *interim* receiver other than the Official Receiver shall be required to give such security as the Court thinks fit; provided that a Nazir, or Deputy Nazir, or other Government Officer who is appointed a receiver or *interim* receiver *ex-officio*, and who has already under the Public Accountants' Default Act XII of 1850, or otherwise, given security, that is still valid, for the due account of all monies which shall come into his possession or control by reason of his office, shall not be required to give such security unless, owing to the extent of the assets likely to be realised, or for other special reasons, the Court thinks it desirable to do so.

(2) The Court shall not require an Official Receiver to give security in each case in which he acts under section 57 (2); but he shall, previous to his admission, or within such further time as the Court may allow, give general security by entering into a recognizance with one more sufficient sureties in Form No. 16 or by depositing Government Securities, in such time as the High Court may fix in this behalf.

(3) Where a petition is referred to an Official Receiver for disposal in exercise of his powers under section 80, the Court ordinarily shall, when the debtor is the petitioner, and may, when a creditor is the petitioner, at the same time appoint him an *interim* receiver under section 20, and confer on him all the powers conferable on a receiver under Order XL, rule (1) (d), of the Civil Procedure Code. Such Official Receiver, upon making an order of adjudication, shall at once apply to the Court for an order appointing, him Receiver for the property of the insolvent under sections 56 and 57. The Official Receiver should at the same time submit a draft order in Form No. 6, with the necessary modifications, for signature and sealing.

XIII.—The Court may remove or discharge any receiver other than an Official Receiver, and any receiver or interim receiver so removed or discharged, or any Official Receiver suspended or dismissed by the Local Government, shall unless the Court otherwise orders, deliver up any assets of the debtor in his hands and books, accounts or other documents relating to the debtor's property which are in his possession or under his control to such person as the Court may direct.

(2) If an order of adjudication is annulled, the receiver (if any) shall, unless the Court otherwise orders, deliver up any assets of the debtor in his hands and any books, accounts or other documents relating to the debtor's property which are in his possession or under his control to the debtor or to such other person as the Court may direct.

XIV.—Every receiver or interim receiver shall be deemed for the purpose of the Act and of these rules to be an officer of the Court.

XV.—(1) Every application to the Court made by a receiver or an interim receiver shall be in writing.

(2) The Court may order that notice of any application by the receiver and of the date fixed for the hearing of the application shall be sent by registered post to all creditors who have proved.

XVI.—(1) The remuneration of receivers other than Official Receivers shall be in such proportion to the amount of the dividends

distributed as the Court may direct, provided that it does not exceed five per centum of the amount of the dividends.

(2) When a Receiver realizes the security of a secured creditor, the Court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors.

(3) If a Receiver other than the Official Receiver has been appointed in an insolvency in which the Court makes an order approving a proposal under Section 39 of the Act, the remuneration to be paid to the Receiver shall be fixed by the Court, and the order approving the proposal shall make provision for the payment of the remuneration and shall be subject to the payment thereof.

XVII.—The Receiver in making his report shall state whether in his opinion any of the facts mentioned in Section 42, Sub-clause (1), of the Act exist, and if the debtor makes a proposal under Section 38(1) of the Act, the Receiver shall state in his report whether in his opinion the proposal is reasonable and is likely to benefit the general body of the creditors and shall state the reasons for his opinion.

XVIII.—If the Court directs, the debtor shall furnish the Receiver or, if a Receiver has not been appointed, the Court, with a trading account, and an account showing all moneys and securities paid, disposed of or encumbered, or recovered by or from the debtor or on his account and his income and the source thereof for such period as the Receiver or, if a Receiver has not been appointed, the Court may direct: provided that the Receiver shall not, without the previous sanction of the Court direct the debtor to furnish accounts for more than two years before the date of the presentation of the insolvency petition.

XIX.—(1) The Receiver shall keep a cash book and such books and other papers as are necessary to give a correct view of his administration of the estate, and shall submit his accounts at such times and in such forms as the Court may direct. Such accounts shall be audited by such person or persons as the Court may direct. The costs of the audit shall be fixed by the Court and shall be paid out of the estate.

(2) Any creditor who has proved his debt, or the debtor, shall be entitled to obtain a copy of the Receiver's accounts (or any part thereof) relating to the estate on payment of the legal fees therefor.

XX.—The Receiver shall deposit all valuable securities for safe custody with the Nazir or, if so ordered by the Court in the Imperial Bank of India, and whenever a sum exceeding Rs. 500 shall stand to

the credit of any one estate, the Receiver shall give notice thereof to the Court, and, unless it shall appear that a dividend is about to be immediately declared, he shall obtain the Court's order to invest the same in a Promissory Note of the Government of India or in Post Office Cash Certificates.

Dividends.

XXI.—No dividend shall be distributed by a Receiver without the previous sanction of the Court.

XXII.—The amount of the dividend may, at the request and risk of the creditor, be transmitted to him by post.

Discharge.

XXIII.—(1) An application for discharge shall not ordinarily be heard until after the schedule of creditors has been framed and the Receiver has submitted his report. The Receiver, if he is in a position to make it and has not already done so, shall file his report in Court not less than fourteen days before the date fixed for the hearing of the application.

(2) Every creditor who has proved shall be entitled in person or by Pleader to appear at the hearing and oppose the discharge: provided that he has served upon the insolvent and upon the Receiver (if any) not less than 7 days before the date fixed for the hearing a notice stating the ground of his opposition to the discharge.

(3) A creditor who has not served the prescribed notices shall not, unless the Court otherwise directs, be permitted to oppose the discharge of the debtor; and a creditor who has served the prescribed notices shall not be permitted, unless the Court otherwise directs, to oppose the discharge on any ground not specified in the notice.

(4) At the hearing of the application the Court may hear any evidence which may be tendered by a creditor who has served the prescribed notices, or by the Receiver, and also any evidence which may be tendered on behalf of the debtor and shall examine the debtor, if necessary, for the purpose of explaining any evidence tendered and may hear the Receiver, the debtor, in person or by Pleader, and any creditor, in person or by Pleader, who has served the prescribed notice.

(5) Any case in which the debtor fails to apply for his discharge within the period allowed by the Court under Section 27 shall be brought up for orders under Section 43. If the Court has omitted to

specify a period under Section 27(1) and the debtor has not already applied for discharge, the Court upon receipt of the Receiver's report shall fix a period within which the debtor shall apply for an order of discharge. Notice of such period shall be given to the Receiver and the debtor, and if on its expiry, the debtor has not applied accordingly, the case shall be brought up for orders under Section 43.

Notices.

XXIV.—(1) The notices to be given under Sections 30 and 37(2) of the Act shall be published in the Bombay Government Gazette, in English, and, if the Court so directs, in any suitable English or Vernacular newspaper and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(2) The notices to be given under Section 19(2), 38(1) and 41(1) of the Act shall be published in any suitable English or Vernacular newspaper, and if the Court so directs, in the Bombay Government Gazette, and copies of the notices in English and in the language of the Court shall be affixed to the notice-board of the Court.

(3) Notice of the date fixed for the hearing of an insolvency petition under Section 19(1) of the Act shall be sent by the Court by registered post, if the petition is by the debtor, to all creditors mentioned in the petition, and if the petition is by a creditor, to the debtor, no less than 14 days before the said date.

(4) Notice of the date fixed for the consideration of a proposal under Section 38(1) of the Act shall be sent by the Court by registered post to all creditors who have tendered proof of their debts not less than 14 days before the said date.

(5) Notice of the date fixed for the hearing of an application for discharge under Section 41(1) of the Act shall be despatched by the Court by registered post to all persons whose names have been entered in the Schedule of creditors not less than 14 days before the said date.

(6) The notice to be given under Section 64 of the Act shall be sent by the Receiver by registered post to all persons whose claims to be creditors have been notified but not proved not less than one calendar month before the limit of time fixed for proving claims.

(7) The notice to be given under Section 33(3) of the Act shall be served only on the debtor and on the creditors whose names appear in the Schedule of creditors and may, if the Court so directs, be served on any or all such creditors by registered post.

(8) The Court may instead of or in addition to forwarding a notice by registered post under the foregoing rules cause it to be served in the manner prescribed for the service of summons.

(9) In addition to the prescribed methods of publication any notice may be published otherwise in such manner as the Court may direct, for instance, by affixing copies in the Court house or by beat of drum in the village in which the debtor resides.

(10) It shall not be necessary to give notice of the date to which the hearing of a petition or of an application for discharge or the consideration of a proposal is adjourned.

Summary Administration.

XXV.—When an estate is ordered to be administered in a summary manner under Section 74 of the Act, the provisions of the Act and rules shall, subject to any special direction of the Court and in addition to the modifications contained in Section 74, be modified as follows, namely:—

- (i) There shall be no advertisement of any proceedings in a local paper.
- (ii) The petition and all subsequent proceedings shall be endorsed "Summary Case".
- (iii) The notice of the hearing of the petition to the creditors shall be in Form No. 15.
- (iv) The Court shall examine the debtor as to his affairs but shall not be bound to call a meeting of creditors, but the creditors shall be entitled to be heard and to cross-examine the debtor.
- (v) The appointment of a Receiver will generally not be necessary, and the Court may act under Section 58 of the Act in order to reduce the cost of the proceedings.

Sale of immoveable property of debtor.

XXVI.—If no Receiver is appointed and the Court, in exercise of its powers under Section 58 of the Act, sells any immovable property of the debtor, the deed of sale of the said property shall be prepared by the purchaser at his own cost and shall (subject to any modifications the Court thinks necessary) be signed by the Presiding Officer of the Court.

Costs.

XXVII.—(1) All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting them; but when an order of adjudication has been made, the costs of the petitioning creditors shall be taxed and be payable out of the estate.

(2) Before making an order in an insolvency petition presented by a debtor, the Court may require the debtor to deposit in Court a sum sufficient to cover the costs of sending the prescribed notices of the hearing of petition.

(3) No costs incurred by a debtor of, or incidental to, an application to approve a composition or scheme shall be allowed out of the estate, if the Court refuses to approve the composition or scheme.

(4) Whenever a creditor presents an insolvency petition he shall deposit in Court the sum of Rs. 150 to cover expenses. Such deposits shall be paid out of the first available assets realised.

Procedure where the Debtor is a Firm.

XXVIII.—(1) Where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his own signature, *e.g.*, “Brown & Co., by James Green, a partner in the said firm.”

(2) Any notice or petition for which personal service is necessary, shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm within the jurisdiction of the Court, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

(3) The provisions of the last preceding rule shall, so far as the nature of the case will admit, apply in the case of any person carrying on business within the jurisdiction in a name or style other than his own.

(4) Where a firm of debtors file an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same. .

(5) An adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in that firm.

(6) In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs.

(7) The Joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by Joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposals of some or one of the debtors made to their or his separate creditors may not be accepted.

(8) Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposals made to the Joint Creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposal may vary in character and amount. Where a composition or scheme is approved, the adjudication order shall be annulled only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

(8) If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last-mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And when any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

Inspection of Proceedings.

XXIX.—All insolvency proceedings may be inspected at such times and subject to such restrictions as the Court may prescribe by the Receiver, the debtor, any creditor who has proved or any legal representative on their behalf.

Pleaders' Fees.

XXX.—The fees allowed to Pleaders as costs in any proceedings under the Act shall be such as are allowed under the rules of the Court for a miscellaneous proceeding.

APPENDIX.

Form No. 1.

General Title.

In the Court of

Insolvency Petition No.

of 19

In the matter of

Exparte (here insert "the debtor" or "A.B. a creditor" or "the Official Receiver" or "the Receiver").

Form No. 2.

Debtor's Petition.

(Title.)

I (a) ordinarily residing at,

(or "carrying on business

(a) Insert name and address and description of debtor.

at," or "personally working for gain at" or "in custody at") in

(b) State name of Court and particulars of decree in respect of which the order of detention has been made or by which an order of attachment has been made against debtor's property.

consequence of the order of (b) being unable to pay my debts, hereby petition that I may be adjudged an insolvent. The total amount of all pecuniary claims against me is Rs. (c)

(c) State whether and how any of the debts are secured.

as set out in detail in Schedule A annexed hereunto, which contains the names and residences of all my creditors so far as they are known to, or can

be ascertained by me. The amount and particulars of all my property and debts due to me are set out in Schedule B annexed hereunto together with specification of all my property, not consisting of money, and the place or places at which such property is to be found, and I hereby declare that I am willing to place all such property at the disposal of the Court save in so far as it includes such particulars (not being my books of account) as are exempted by law from attachment and sale in execution of a decree.

(d) I filed a petition to be adjudged an insolvent in the Court of

(d) Strike out the whole of this clause if the debtor has not filed a previous petition to be adjudged an insolvent, and substitute a statement to that effect. on or about and on such petition was adjudged an insolvent in respect of debts totalling approximately Rs. against which assets were realized to the extent of approximately Rs. and a dividend (or "dividends") of in the rupee was (or "were") declared. I was granted an absolute order of discharge (or "I was refused an absolute order of discharge and my discharge was suspended for "and/or" I was granted an order of discharge subject to the following conditions") on or about

This adjudication has been annulled on the following grounds

(or "has not been annulled")

(or for the above from

"and on such petition" substitute)

"and such petition was dismissed for the following reasons:—

(Signature).

(Verification clause as in plaints).

Schedule A referred to in Form No. 2.

Form of list of creditors to be annexed to the debtor's petition.

CREDITORS.

No.	Names and residences of creditors and claimants.	Nature and consideration of debt or claim and securities (if any); also, if the debt is disputed, the reason.	When contracted.	Amount of claim.	Payments.	Interest due at date of presenting petition or filing Schedule with rate.	Balance due.	Admitted or disputed.

N.B.—Where there have been mutual dealings and it is alleged that a claim by any party has been set-off, such party must be entered both as a creditor and debtor and the word "Set-off" must be written under the amount.

Schedule B referred to in Form No. 2.

Form of list of debtors to be annexed to the debtor's petition.

DEBTORS.

No.	Name and residence of debtors.	Nature and consideration of the debt and the securities (if any) for the same.	When contracted.	Amount.	Good, bad or doubtful.	Witnesses with their residences and other evidence by which the debt may be proved.

N.B.—Where there have been mutual dealings and it is alleged that a claim by any party has been set-off, such party must be entered both as a creditor and debtor and the word 'Set-off' must be written under the amount.

Form No. 3.**Creditor's Petition.**

(Title).

I, C.D., of (or We, C.D., of
 & E.F., of) hereby petition the Court that A.B. (a)
 ordinarily residing at
 (a) Insert name, ad- (or "carrying on business at"
 dress and descrip- or "personally working for gain at
 tion. "), may be adjudged an
 insolvent and say :—

1. That the said A.B. is justly and truly indebted to me (or us
 in the aggregate) in the sum of Rs. (set out amount of debt or
 debts, and the consideration).

2. That I (or we) do not, nor does any person on my (or our)
 behalf hold any security on the said debtor's estate, or any part there-
 of, for the payment of the said sum.

Or,

That I hold security for the payment of (or part of) the said sum
 (but that I will give up such security for the benefit of the creditors
 of the said A.B. in the event of his being adjudged insolvent) (or,
 and I estimate the value of such security at the sum of Rs.).

Or,

That I, C.D., one of your petitioners, hold security for the pay-
 ment of, etc.

That I, E.F., another of your petitioners, hold security for the
 payment of, etc.

3. That the said A.B. within 3 months before the date of the
 presentation of this petition has committed the following act (or acts)
 of insolvency, namely, (here set out the nature and date
 or dates of the act or acts of insolvency relied on).

(Signature)

(Verification clause as in plaints).

Form No. 4.**Notice to creditors of the date of hearing of an insolvency petition—section 19.**

(Title).

Whereas A.B. has applied to this Court, by a petition, dated
of 19 to be declared an insolvent under the Provincial Insolvency Act (V of 1920), and your name appears in the list of creditors filed by the aforesaid debtor, this is to give you notice that the Court has fixed the day of 19 for the hearing of the aforesaid petition and the examination of the debtor. If you desire to be represented in the matter you should attend in person or by a duly instructed pleader. The particulars of the debt alleged in the petition to be due to you, are as follows :—

Dated this day of 19 .

Judge.

Form No. 5.**Order of Adjudication—section 27.**

(Title).

Pursuant to a petition dated (here insert name, description and address of debtor) and on reading and hearing it is ordered that the debtor be and the said debtor is hereby adjudged insolvent.

Dated this day of 19 .

Judge.

Form No. 6.**Order appointing a Receiver—section 56.**

(Title).

Whereas A.B. was adjudicated an insolvent by order of this Court, dated , and it appears to the Court that the appointment of a receiver for the property of the insolvent is necessary :

It is ordered that a receiving order be made against the insolvent and a receiving order is hereby made against the insolvent and R. S. of (or the Official Receiver) is hereby constituted receiver of the property of the said insolvent.

And it is further ordered that the said receiver (not being the Official Receiver) do give security to the Govt. Officer who has given security that is still valid of the kind mentioned in the proviso to Rule XII (1), strike out this paragraph unless the Court specially directs him to give such security.

Dated this day of 19 .

Judge.

Form No. 7.

Proof of debt.

General Form—section 49.

(Title).

In the matter of

(a) Here insert number No. (a) of 19 .
 given in the notice. I, of (b) make oath.
 (b) Address in full. and say (or solemnly and sincerely affirm and declare):—

That the said , at the date of the petition, viz., the
 day of 19 , and still justly and truly indebted to me
 in the sum of Rs. as. p. , for (c) as shown by the account
 (c) State consideration endorsed hereon (or the following account),
 & specify the vou- viz:—
 chers (if any) in sup-
 port of the claim.

For which sum or any part thereof I say that I have not, nor
 hath any person by (d) order to my knowledge or belief for (d) use

(d) Here insert words had or received any manner of satisfaction
 “my” or “our” or or security whatsoever save and except the
 “their” or “his,” as following (e):—
 the case may be.

(e) Here details of secu-
 rities bills or the
 like.

Admitted to vote for Rs.	} this day before me.	{ Sworn at Deponent's Signature.
Judge or Official Receiver.		

(Signed) X. Y.
 Designation.

Form No. 8.**Proof of debt of workmen.**

(Title).

I (a) of (b) make oath and say (or solemnly and sincerely affirm

and declare :—That (c) at the date of

(a) Fill in full name, address and occupation of deponent. the adjudication, viz. the day of 19 , and still justly and

(b) The abovenamed debtor or the foreman of the abovenamed debtor or on behalf of the workmen & others employed by the abovenamed debtor. indebted to the several persons whose names, addresses and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or

(c) "I" or "the said." others in (d) in respect of services rendered by them respectively to (e)

(d) "My employ" or "the employ of the abovenamed debtor." during such periods before the date of the

(e) "Me" or "the abovenamed debtor." receiving order as are set out against their

respective names in the fifth column of such schedule, for which said sums, or any part thereof, I say that they have not, nor hath any of them had or received, any manner of satisfaction or security whatsoever.

Sworn at

Admitted to vote for Rs.

} this day before me.

{ Deponent's Signature.

Judge or Official Receiver.

(Signed) X. Y.

Designation.

Form No. 9.**Notice to creditors of the date of consideration of a composition or scheme of arrangement—section 38.**

(Title).

Take notice that the Court has fixed the day of 19 , for the consideration of a composition (or scheme of arrangement) submitted by A. B., the debtor in the above insolvency petition. No creditor who has not proved his debt before the aforesaid date will be permitted to vote on the consideration of the above matter. If you desire to be represented at the abovementioned hearing you should be present in person or by a duly instructed pleader with your proofs.

Dated this day of 19 .

Judge.

Form No. 12.**Order annulling Adjudication under section 37.**

(Title).

On the application of R. S., of _____, and on reading and having _____ it is ordered that the order of adjudication dated _____ against A. B., of _____ be and the same is hereby annulled.

Dated this _____ day of _____ 19 .

Judge.

Form No. 13.**Notice to Creditors of Application for Discharge—section 41 (1).**

(Title).

Take notice that the abovenamed insolvent has applied to the Court for his discharge and that the Court has fixed the _____ day of _____ 19 at _____ o'clock for hearing the application.

Dated this _____ day of _____ 19 .

Judge.

Note.—On the back of this notice the provisions of section 42 (1), Act V of 1920 should be printed.

Form No. 14.**Order of Discharge subject to conditions as to earnings, after-acquired property and income.**

Section 41 (2) (a), (b) or (c).

(Title).

On the application of _____, adjudged insolvent on the _____ day of _____ 19, and upon taking into consideration the report of the Official Receiver (or receiver) as to the insolvent's conduct and affairs and hearing A. B. and C. D. creditors:

It is ordered that the Insolvent—

(a) be discharged forthwith; or

(b) be discharged on the _____, or

(c) be discharged subject to the following conditions as to his future earnings, after-acquired property and income:—

After setting aside out of the insolvent's earnings, after-acquired property, and income, the yearly sum of Rs. _____ for the support of himself and his family, the insolvent shall pay the surplus, if any (or such portion of such surplus as the Court may determine), of such

earnings, after-acquired property, and income to the Court or Official Receiver (or receiver) for distribution among the creditors in the insolvency. An account shall, on the 1st day of January in every year or within 14 days thereafter, be filed in these proceedings, by the insolvent setting forth a statement of his receipts from earnings, after-acquired property, and income during the year immediately preceding the said date, and the surplus payable under this order shall be paid by the insolvent into Court or to the Official Receiver (or receiver) within 14 days of the filing of the said account.

Dated this day of 19 .

Judge.

Form No. 15.

Summary Administration—section 74-

(Title.)

Notice to Creditors.

Take notice that on the day of 19 , the abovenamed debtor presented a petition to this Court praying to be adjudicated an insolvent and that on the day of 19 , the Court being satisfied that the property of the debtor is not likely to exceed Rs. 500, directed that the debtor's estate be administered in a summary manner and appointed the day of 19 , for the further hearing of the said petition and the examination of the said debtor.

Also take notice that the Court may, on the aforesaid date then and there, proceed to adjudication and distribution of the assets of the aforesaid debtor. It will be open to you to appear and give evidence on that date. Proof of any claim you desire to make must be lodged in Court on or before that date.

Given under my hand and the seal of the Court this day of
19 .

Judge.

Form No. 16.

Recognizance of the Official Receiver and sureties.

(Rule XIV).

The Judge of the District Court has approved of and allowed this recognizance.

R. P. H. of, etc., W. B. of, etc., and T. P. of, etc.; in the District Court of personally appearing, do acknowledge themselves, and every of them doth acknowledge himself to owe the respective

sums of money set opposite to their respective names in the schedule hereto to be paid to Esquire, Judge of the said District Court of his successors in office or assigns; and in default of payment of the said respective sums, the said R. P. H., W. B., and T. P. are willing and do agree each for himself, his heirs, executors and administrators, by these presents, that the said sums shall be levied, recovered and received of and from them, and every of them, and of and from them, and every of them, and of and from all and singular the manors, messuages, lands, tenements and hereditaments, goods and chattels of them and every of them wheresover the same shall be found. Witness the day of 19 . Whereas the Government of Bombay have by an order No. dated the day of 19 , appointed the said R. H. H. Official Receiver under Section 57 of the Provincial Insolvency Act (V of 1920) and he has thereby become liable to give security to be approved of by the said District Court. And whereas the said Judge has approved of the said W. B. and T. P. to be sureties for the said R. P. H., in the amounts set opposite to their respective names in the schedule hereto and has also approved of the above written recognizance, with the underwritten condition as a proper security to be entered into by the said R. P. H., and T. P., and in testimony of such approbation.....Esquire, the judge of the said Court, hath signed his name in the margin hereof. Now the condition of the abovementioned recognizance is such that if the said R. P. H., his executors or administrators or any of them do and shall duly account for what the said R. P. H. shall receive or get under his control, or become liable to pay, as Official Receiver at such periods and in such manner as the said Courts shall appoint, and pay the same as the said Court direct, then the above recognizance to be void, otherwise to remain in full force and virtue.

The schedule above referred to.

R. P. H.	...	...	thousand rupees.
W. B.	...	...	thousand rupees.
T. P.	...	...	thousand rupees.

Taken and acknowledged by the abovenamed R. P. H., etc., etc.

Form No. 17.

Register of Insolvency Petitions.

1	2	3	4	5	6	7	8
No. & date of petition.	Names of (a) petitioners and (b) opponents.	Nature of petition, etc.	(a) Total amount of alleged debts. (b) Total amount of proved debts.	(a) Total amount of alleged assets. (b) Description & total amount of assets realized.	Names or designation of Receiver, fees paid to him & dates of payment.	Brief note of interim orders passed by the Court & dates thereof, e.g., re dismissal of petition, adjunction, appointment of Receiver, annulment, framing, schedule of creditors, scheme of composition, declaration of dividends, etc.	Summary of final order and date thereof, e.g., re. discharge, annulment, enforcement of penal provisions, etc.

Bombay, 31st October 1924.

Sd/- N. D. GHARDA,

Registrar.

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INDEX

Figures in the margin refer to pages.

A

Abscond from jurisdiction, 153.
 Absence from dwelling house, 46.
 Abuse of the process of the Court,
 36, 104, 110.
 annulment on the ground of,
 164.
 before and after, adjudication
 165.
 Account, books of, 94, 95.
 failure to keep or produce,
 67.
 omission to keep, 182, 184.
 when to be produced, 95.
 penalty for failure to produce,
 280.
 receiver failing to submit, 241.
 attachment of, 91.
 property includes, 116.
 Act V of 1920, Provincial Insol-
 vency Act. 1.
 its extent, 1, 2.
 its operation, 2.
 retrospective effect, 2, 3.
 difference between Act III of
 1907 and, 49, 113, 118, 151,
 172.
 Acts of insolvency, available, 5.
 what are, 39, 41.
 classification of, 41.
 of agents are acts of princi-
 pal, 40, 48.
 limitation applicable to, 44.
 of a firm, 56.
 Additional District Judge, juris-
 diction of, 21.
 not subordinate to, 21.
 appeals from orders of, 298.
 Ad Interim protection, 97, 99.
 receiver, 89.
 proceedings, against insol-
 vents. 91.

Adjudication, admission of petition
 for, 87.
 order of, 112.
 effect of an order of, 115.
 date of the order of, 157.
 meaning of, 117; 118.
 publication of, 150.
 annulment of, for failure to
 apply for discharge, 187.
 when an abuse, 164.
 effect of annulment of, 169.
 when should be made, 166.
 proceedings on annulment, 169.
 Concurrent orders of, 167
 Re., 176.
 transfers made after, 240.
 Administration, of property, 192.
 summary, 291.
 expenses of, 264.
 Admission of petition, 87.
 procedure on, 87.
 After-acquired property, 115, 138.
 insolvent's right of suit for,
 141.
 Agent, acts of insolvency of, 40, 48.
 Commission, 8.
 His lien, 18.
 Agra Tenancy Act, 5, 66.
 Agricultural Tenancy, 5.
 purposes, held or let for, 262.
 holdings, 197.
 sale of, 262.
 Aggrieved persons, 278, 296.
 Aid by insolvent, 115.
 Alimony, 150.
 Allowance to the insolvent, 271,
 272.
 Amendment of petition, 77.
 Annulment of adjudication, 163.
 for abuse of process of Court,
 164.
 its effect, 169, 171, 177.
 when should be made, 166.
 proceedings on, 169.

- C**

- Carriage of proceedings, change in, 85.
- Carry on business, 48, 73.
- Certificate of conduct, 290.
- Changes made by Act V of 1920, 103.
- Character of receiver's interest, 119.
- Charge, how created, 16.
- Charge, mortgage or lien, 15.
 - under Sec. 69, 287.
- Choice of secured creditors, 26.
- Civil Court, jurisdiction of, 28.
- Civil Procedure Code, 5, 35, 37, 74, 78, 294.
- Claim for damages, 7, 129.
- Claim, settlement of, out of Court, 83.
- Clerk, wages of, 264.
- Code, Indian Penal, 285.
 - Criminal Procedure, 287.
- Commission agent, 8.
- Commissioner in insolvency, 23.
- Compensation, award of, 111.
 - suit for, 111.
- Composition, or scheme of arrangement, 171.
 - creditor assenting to a, 57.
 - acceptance by creditors, 173.
 - order of approval, 175.
 - effect of, 177.
 - annulment of, 177.
- Concealment of property, 109.
- Concurrent order of adjudication, 167.
- Conditions of a creditor's petition, 57.
 - secured creditor's petitions, 57.
 - debtor's petition, 63, 67.
 - for annulment of voluntary transfers, 216.
- Consideration, valuable, 219.
- Consolidation of petitions, 83.
- Contempt of Court, 248.
 - committal for, 248.
 - power of District Court to commit for, 249.
- Contents of petition, 75.
- Continuance of proceedings, 85.
- Contract, breach of, 129, 261.
- Corporation, exemption of, 54.
- Council, Privy, appeal to, 38, 301.
- Court, defined, 6.
 - having jurisdiction, 20.
 - invested by Local Government, 20, 23.
 - District, 20.
 - subordinate to a District Court, 20, 21, 298.
- Court of Small Causes, 20.
 - power of, to decide questions of law and fact, 24.
 - its general powers, 34.
 - substitution by, 36.
 - what should enquire, 51.
 - what order should pass, 53.
 - competency to enquire liquidated sum, 61.
 - to which applications should be made, 69.
 - power to enlarge time for discharge, 114.
 - executing decrees, duties of, 211.
 - its powers, when no receiver, 203.
 - limitation to its powers, 257.
 - leave of, for suit, 258.
 - sanction of, to sue receiver, 260.
 - appeal to, against receiver, 274.
 - to be auxiliary to each other, 303.
 - Civil jurisdiction of, 28.
- Costs, 102.
 - in insolvency proceedings, 302.
 - of suit and execution, when first charge, 211.
- Credit, undischarged insolvent obtaining credit, 289.
 - false 119, 133.
- Creditor, defined, 5, 57, 60.
 - contingent, 5.
 - secured, 4, 63.
 - and secured creditor, distinction between, 236.
 - rights of a secured, 116, 141, 196, 197.

Creditor—

- his petition, 49.
- precluded from making petition, 59.
- assenting to a composition, 59.
- his election of remedies, 62.
- schedule of, 153, 161.
- execution, 206.
- who has not proved his debts, 269.

Criminal liability after discharge, 302.

- Crown debts, priority of, 264.
- and mortgage, 266.

Custody, 69, 73.

D

- Damages, claim for, 7.
- for breach of contract, 129.

Damdupat, rule of, 202.

Date of adjudication, 157.

Dealings, mutual, 193.

Death, of debtor, continuance of proceedings after, 85.

Debtor, 5.

- his petition for adjudication, 49, 107.
- conditions of his petition, 63.
- his duties, 95, 115, 116, 117.
- his release, 97.
- his examination, 105.
- dismissal of his petition, 106.
- offences by the, 280.

Debt, defined, 6.

- provable under the Act, 115, 154, 156.
- suit in respect of, 115.
- joint, 150.
- barred, 158.
- not provable, 159.
- priority of, 264.
- due to the Crown, 264.
- due to the local authorities, 264.
- payable at future time, 192.

Decision, final, 24.

- res judicata*, 27.
- not resjudicata*, 30.
- summary, 30.

Declaration, of inability to pay, 47.

Decrees, execution of, 206.

- limitation applicable to, 305.

Defects, in Act III of 1907, 68, 112.

Definitions, 4.

Delegation of jurisdiction, 215.

- of powers to receiver, 310.

Departure from old law, 14.

- from jurisdiction, 153.

Difference, points of bet. Act III of 1907 and Act V of 1920, 49, 113, 118, 151, 172.

Discharge, failure to apply for, 64, 68.

- Court's power to enlarge time for, 112, 114.

application for, 177.

objection to, 177.

notice of application for, 177.

orders to be passed for, 177.

grant or refusal of, 177.

suspension of, 177, 181.

grant of, subject to conditions, 177.

effect of, 178, 179.

procedure at hearing of, 179.

statutory limitations for, 179.

its effect, on secured creditors, 180.

conditions, 182.

foreign Court, 182.

cases in which the Court must refuse, 182.

effect of refusal, 186.

failure to apply for, effect of, 187.

its effect on Crown debts, 189.

its effect on fraud or fraudulent breach of trust, 189.

its effect on debts provable, 189.

its effect outside India, 192.

Discretion, in the exercise of jurisdiction under Sec. 4, 32.

of Court for release of debtor, 97.

in granting an order of discharge, 179.

of appeal to Court against receiver, 277.

- Dismissal, for abuse of the process of Court, 36. 110.
 of debtor's petition, 106.
 of creditor's petition, 106.
 for sufficient cause, 107.
 on the ground of assets exceeding liabilities, 109.
 for concealment of property, 109.
- Disposing power. 4.
 of partnership assets, 12.
 of joint Hindu family property, 14.
- Disqualification of an insolvent, 290.
 removal of, 290.
- Distribution of property. 264.
 rateable, 209.
- District, scheduled, 3.
 Court, 4.
 Courts; Courts having jurisdiction under the Act, 20.
 judge, 6.
 judge. additional, 21.
 Courts, proceedings in, 34.
 Courts, Courts subordinate to, 20, 21.
 Courts, appeal from. 294.
 Courts, appeal to, 23, 294.
- Dividend, calculation of, 267.
 sums to be retained in. 267.
 rights of a creditor to, 269.
 final, 269.
 suit for, 270.
- Documents, failure to disclose, 92.
- Domicile, 70.
- E**
- Earnings, personal, 8.
 Effect, retrospective, 2.
 Election of remedies, 62. 279.
 to office, 290.
 Enactments, repealed, 316.
 Enquire, what should, the Court, 51.
 Enquires, scope of, 102, 108.
 Equitable. owner, 136.
 Estoppel, 276.
 Evidence, oral, 100.
 quantum of, 102.
 memorandum of, 100.
 when receiver's report is, 179.
- Examination of the debtor. 103.
- Exceptions to fraudulent preferences, 234.
- Exclusive jurisdiction, 28.
- Exclusion of the period of limitation, 305.
- Execution of decree, 206.
- Executing Court, duties of, 207.
- Execution costs. first charge, 211.
- Expenses of administration, 264.
- Extravagance, unjustifiable, 183.
- F**
- Faith, good, 217, 238.
 bad, 178. 284
- False credit, 119, 133.
 books of accounts. 281
 entries, 281.
- Family, Mitakshara Hindu Joint, 13, 121.
 Dayabhaga Hindu, 125
 firm, Hindu. 125.
- Final decision, 24.
 in appeal, 294, 299.
- Financial position, 183.
- Firm, Hindu family, 125.
 petition against, 50.
 acts of insolvency of, 56.
- Foreign Country, effects of the order of discharge in, 192.
 Court, 182.
- Formulas secret, 8.
- Fraud of gomosta, 48.
 or fraudulent breach of trust, 183, 189.
- Fraudulent transfer, Classes of. 42.
 intention, 43.
 preference, 44.
- Fresh application for adjudication, 53.
 on the same facts, 80.
- F frivolous & Vexatious petitions, 111.
- Furniture. 136.
- Future earnings, 138.
 property, 240.
- G**
- Gambling, 183.

General rule of interest, 203.
 powers of Courts, 34.
 Gift to wife, 217.
 Gomosta, fraud of. 48.
 Carrying on business by, 49.
 Good faith, 217, 238.
 on whose part, 219.
 Government, Local, investment by,
 20.
 power to bar application of cer-
 tain sections, 312.
 sanction of, in framing rules,
 308.
 Governor-General in Council,
 Sanction of in framing rules,
 308.

H.

Hazardous speculation, 183.
 Hearing of petition. procedure at,
 100.
 of debtor's petition, 101.
 of creditor's 101.
 costs of, 102.
 scope of enquiry at, 102.
 changes made by the new Act,
 103.
 High Court, its power & proce-
 dure. 34, 38.
 appeal to, 294.
 its power of revision, 294.
 leave to appeal, 294.
 limitation for appeals to, 294.
 power to make rules, 307.
 delegation of powers to Official
 receivers by, 310.
 decisions & orders from which
 appeal lies to, 314.
 Hindu family firm, 125.
 property, 13. 121.

I

Immoveable property, 7.
 special provisions in regard
 to, 262.
 Imprisonment. 40, 48, 287,
 Inability to pay debts, 47, 103.
 Incorporated Company, 54.
 Incumbrancer in good faith, 215.

Indian Penal Code, prosecution
 under, 285.
 Inherent power to release. 36, 99.
 Insolvency, Acts of, 39.
 meaning of, 41.
 Classification of, 41.
 Insolvency Court, 20.
 power Co-extensive with Civil
 Court, 25.
 exclusive jurisdiction of, 28.
 where ought to exercise juris-
 diction, 29.
 its power to set aside summary
 decision of a Civil Court. 30.
 Law and procedure of, 31, 34.
 petition by or against joint-
 debtors, 52.
 petition, who can present, 58.
 of a debtor, 63.
 of creditor. 57.
 Court to which it shall be
 presented, 69.
 Insolvency petition, contents of,
 75.
 amendment of, 77.
 fresh, 89.
 withdrawal of. 82.
 Consolidation of, 83.
 procedure for admission of, 87.
 procedure on admission of, 87.
 procedure at hearing of, 100.
 dismissal of, 106.
 order of adjudication on. 112.
 proceedings, pendency of, 115,
 132.
 receiver in. 258.
 Insolvent, suits and appeals by,
 129.
 against, 130.
 his disqualifications, 290.
 duties of, 95, 115.
 release of. 97.
 his rights to after-acquired
 properties, 138, 141.
 management by and allowance
 to, 271.
 his right to surplus, 273.
 criminal liability of, 288,

- Intention to defeat or delay. proof
 of, 42.
 allegation of, 46.
 presumption of, 46.
 Interest, saleable, 24.
 payable in insolvency, 201,
 267.
 reversioner's, 128.
 Interim, receiver, 89.
 his status, 91.
 and receiver after adjudica-
 tion. 91.
 proceedings against debtor,
 97.
 order of protection, 98.
 Inventory, of property, 95.
 Issues in proceedings under sec.
 53, 224.
- J**
- Joint-creditors, 58.
 debtors. petition by or against,
 50.
 debts, 158.
 family property, Hindu, 13,
 121.
 firm, 125.
 Judgment in rem, 33.
 of the Insolvency Court, has
 the force of a decree, 33, 305.
 Jurisdiction, Courts having, 20,
 Courts invested with, 20, 22.
 Concurrent. 22.
 to annul voluntary transfers,
 214.
 limitation to, 245, 331.
 objections to, 38.
 to extend time for discharge,
 37.
 inherent, 36.
 original Civil, 34.
 discretionary. 33.
 to decide questions of title, 24,
 27..
- K**
- Keep house, 45, 46.
 Keep, books of account, 143.
 Knowledge of insolvency. 185.
- L**
- Labourer, wages of, 264, 266.
 Landlord and tenant, 9, 267.
 Law of Insolvency, in Presidency
 towns. 2.
 outside 2.
 Law and procedure of Insolvency
 Court, 31.
 Lease before adjudication 121, 230.
 Leave of Court, suit without, 115,
 131.
 required by the receiver. 255,
 258.
 appeals by, 294, 300.
 absence of, 258.
 Letters of administration, 58.
 Lien, 15.
 salvage. 17.
 unpaid vendor's, 17, 199.
 partner's 17.
 Trustees, 17,
 Casti qui Trust's, 17.
 Insurer's. 17.
 Solicitors, 17.
 Maritime, 17.
 Judicial, 17.
 Special, 18.
 particular, 18.
 agent's, 18.
 peculiar features of, 19.
 Limitation. applicable to annul-
 ment of voluntary transfers,
 226.
 preference, 237.
 to powers of Court, 247.
 to insolvency jurisdiction 247.
 applicable to Acts of insolven-
 cy, 44.
 Act, Secs. 5 & 12, applicable
 to proceedings. 301, 305.
 Computation of the period of,
 305.
 Limitation for execution of decree
 against insolvent, 305.
 Liquidated Sum, 60.
 Court's competency to enquire,
 61.
 Lis pendens, 260.
- Local authority, 264 296.

- Local Government, power to invest,
9.
power to bar application of certain provisions, 312. 315.
Sanction of, in framing rules, 308.
- M**
- Magistrate, trial by, of undischarged insolvent, 289.
Mahomedan Law, relating to property, 140.
Maintenance is not a debt provable, 98.
allowance to insolvents, 272.
discharge does not effect release from liability to, 189.
Management by the insolvent, 271.
Marriage, transfers made before and in consideration of, 213.
Matters to be proved in an insolvency proceeding, 136.
May, 51.
Meaning of provable debts and proof, 156.
Memorandum of the substance of the examination of the debtor, 100.
Method of proof of debts. 192, 204.
Minor, exempted from adjudication 56.
his properties do not vest in the receiver, 125.
Mitakohara Joint-family property 94, 121.
Mortgage, difference between; and charge, 15. 16.
Suit, Receiver not a necessary party in 142, 198, 254.
of subsequently acquired property. 139.
Mortgagee, a secured creditor, 198, 199.
not a person proving in Bankrupt estate, 169.
not bound by the Insolvency proceedings, 197.
when can he prove in insolvency, 196. 200.
Motive, of fraudulent preference, 229.
Movables, hypothecation of, 19.
Mutual dealings and set-off. 193.
- N**
- Names and residence of creditors, 75.
Non-Scheduled debts, 161.
Notice of suspension of payment, an act of insolvency, 40.
what is not, 47.
of withdrawal of petition, 82.
of the admission of petition, 87. to creditors, 87, 88.
to a debtor on a creditor's petition 87, 88, 100.
how to be served, 87.
of order of annulment of adjudication, 169.
of the order of adjudication, 112.
of composition, 173.
of the application for discharge, 177.
of the admission of petition to an executing court, 211, 212.
of application for annulment of voluntary transfers, 226.
bonafide purchasers without, 238.
to receiver before suit, 261.
of the final dividend, 269.
to show cause why charge should not be framed under sec. 69 287.
contents of, 287.
hearing of such, 287.
- O**
- Objection to jurisdiction, 38, 70.
Occupancy holdings, 261.
Offences by the debtor, 280.
Official Receiver. appointment of, 251, 252.
delegation of powers to, 312.
his remuneration, 251.
vesting order in, 252.

Official—

- his removal, 253.
- his duties and powers, 254.
- and Receiver, difference between, 265.
- Omission to enter properties in schedule, 283.
- Onus of proof under Sec. 4, 32.
 - to annul voluntary transfers under sec. 53, 223.
 - to annul preferences under sec. 54, 231.
- Operation of Act V. 1920, 2.
- Oral evidence, memorandum of, 100.
- Order, what the Court should pass
 - 110.
 - of adjudication, 112.
 - effect of, 115.
 - of adjudication, from what date it takes effect, 116, 146.
 - of protection, 150.
 - of approval of composition, 175.
- Orders and decisions from which appeal lies to the High Court, 314.
- Order and disposition, goods in, 115, 133.
- Owner, true, 134.
 - reputed, 134.
 - legal, 136.
 - equitable, 136.

P

- Parties in appeal, 301.
- Party, is Receiver a necessary, 143, 198.
- Partners. 265.
- Partnership assets, 9, 126.
 - property, distribution of 265.
- Past debts, assignment for, 43.
- Pay, unable to, 64.
- Payment in full, what is, 163, 166.
 - suspension of, 40.
- Penalties, 280.
- Penalty for failure to apply for discharge, 187.

- Pendency of the Insolvency proceeding, what constitutes, 116, 132.
- Pending proceedings, stay of, 148.
- Pension. political, 78, 127.
- Person, aggrieved by order of Receiver, 274, 278, 293, 296.
- Persons, not aggrieved, 278.
- Personal earnings. 8.
- Petition either by creditor or by debtor, 49.
 - presentation of, 49.
 - what should the Court enquire on, 51.
 - what order should the Court pass on, 53.
 - fresh. 53, 80.
 - verification of, 74.
 - contents of, 75.
 - amendment of, 77.
 - withdrawal of, 82.
 - consolidation of, 83.
 - hearing of, 100.
 - dismissal of, 106.
 - and pleadings, models of, 317.
 - presentation of, an act of insolvency, 49.
 - by and against Joint-debtors or firm, 50.
 - frivolous and vexatious, 111.
- Post, proof by, 204.
- Power to cancel concurrent orders of adjudication, 167.
 - general, of the Court, 34.
- Preference, 45.
 - fraudulent, 44.
 - avoidance of, 227.
 - what is, 228.
 - onus of proof of, 231.
 - test of, 233.
 - under pressure, 234.
 - annulment of, 236.
 - in favour of a secured creditor, 235.
 - who can apply for setting aside. 236.
 - limitation applicable to annulment of, 237.
- Priority of debts, 284.

Private arrangement, 167.
 Privy Council, right of appeal to, 38.
 view of Hindu Law, 124.
 Procedure of Insolvency Court, 34.
 for admission of petition, 87.
 on admission of petition, 87.
 on charge under sec. 69, 287.
 Proceedings. change in the carriage of, 85.
 continuance of, on the death of the debtor, 85.
 interim against debtor, 91.
 on annulment, 169.
 stay of pending, 213.
 Process of Court, abuse of, 36.
 Proof, of right to present petition, 106.
 of inability to pay, 66.
 time of, 162.
 of debts payable at future time 192.
 by post, 204
 mode of, 204.
 Property, definition, 4, 7.
 transfer of, 4, 18.
 includes personal earnings, 8.
 includes secret formulas, 8.
 trust, 8, 95.
 inventories, 95.
 Hindu Joint family, 9.
 exempted from attachment 7, 78, 116, 141..
 concealment of, 109.
 that vests, 115.
 goods in order or disposition, 115.
 after-acquired, 115.
 what is not, 126.
 taken in execution, 211, 218.
 paying revenue, sale of, 262.
 let or held for agricultural purposes, 262.
 omission to enter in schedule, 283.
 concealment of, penalty for, 284.
 Prosecution of debtor, 285.
 Protection. *interim*, 98.
 after adjudication, 150.

Protection of *bonafide* transactions, 237.
 Provable debts and proof meaning of, 156.
 Provident Fund, 78.
 Public, examination, 105.
 officer, receiver is, 91, 243, 259, 259.
 Publication of the order of adjudication, 150.
 Purchaser in good faith, 214.

Q

 Question of title and priority, 24.
 of law or fact, 24.
 right to debtor, 102.
 Quantum of evidence, 104.

R

 Railway Provident Fund, 79.
 receipts, 119.
 Rash and hazardous speculation, 183, 185.
 Rate of Interest, 202.
 Rateable distribution, 200.
 Realise security, 196, 199.
 assets, in execution, 208.
 Re-adjudication, 176.
 Receiver, appointment of *interim*, 89.
 his status, 91.
 after adjudication, 91.
 property vests, in, 115.
 interest in property that vests in, 119.
 not a necessary party in a mortgage suit, 143, 198.
 his report, 179.
 his report, when evidence, 104
 appointment of, after adjudication, 240, 243.
 his remuneration, 241, 250.
 attachment of property of, 241.
 interim and after adjudication, difference between, 243.
 after adjudication, his status, 243.
 in insolvency and in action, difference between, 244, 251.
 his duties and powers, 244, 251.
 what vests in, 245.

- Receiver—**
 Court's power over, 248.
 resisting, 248.
 power of Court to punish 249.
 his costs, 250.
 Official, appointment of, 251, 256.
 power of Court where no, 253.
 sales by, 257, 261.
 carrying on business by, 257.
 leave to sue, 258, 259.
 suit against, 260.
 appeal to Court against, 274.
 a public officer, 91, 243, 259.
 delegation of powers to official, 310.
 delegation of Court's duty to, 35.
 official, judicial functions of, 311.
 not a judicial officer, 256.
 entitled to a notice before action against him can be brought, 258, 259.
- Reduction of entries in schedule**, 204.
- Refusal of the order of discharge**, 182.
- Release of debtor**, 97.
- Remedies of a creditor**, 62.
- Removal of a person in possession**, 241, 246.
- Rent, arrears of**, 199.
- Repeals**, 313, 316.
- Reputed owner**, 134.
- Resides**, 71.
 ordinarily, 72.
- Restriction of rights of creditors under execution**, 206.
- Res Judicata**, 31.
- Retrospective effect**, 2.
- Revenue paying property, sales of**, 262.
- Rules prescribed by the Act**, 308.
- Sale of revenue paying property rules of**, 262.
- Sale by the Receiver**, 261.
 by Court, 263.
 Saleable interest, 24.
- Savings**, 312.
- Scheduled Districts**, 3.
- Schedule of creditors**, 153, 161.
 framing of, 160.
 its effect, 161.
 disallowance and reduction of entries in, 204.
 omission to enter properties in 283.
- Scheme of arrangement**, 171.
- Scope of enquiry**, 102, 108, 152.
- Secluding**, 40, 46.
- Second petition**, 38, 80.
 appeals, 299.
- Secret profit**, 190.
- Secured creditor, defined**, 4, 15.
 when a petitioner, 57.
 his petition, 107.
 his rights, 116, 151, 196.
 and reputed owner, 145, 146.
 preference to, 235.
 his choice, 197.
 effect of the order of discharge on, 180.
 dividend payable to, 196.
- Security, value**, 57, 196, 200,
 relinquish, 57, 196, 200.
 realise, 196, 199.
 for appearance, 91, 93.
- Sentence of imprisonment**, 287.
- Separate petitions**, 84.
 debts, 265.
 property, 265.
- Set-off**, 193.
- Small Causes Court**, 20.
- Speculation, rash and hazardous**, 183, 185.
- Statutory Tenancy**, 9.
 limitation, 179.
- Stay of proceedings**, 213.
- Sufficient Cause, dismissal for**, 107.
- Suit, and appeal by the insolvent**, 129.

Salary or wages, priority of, 264.
 half divisible among creditors,
 120, 272.

Suit—

and appeal against the insolvent, 130.
leave of Court for, 115, 131, 145.
Receiver not a party in a mortgage. 142.
before and after adjudication, 149.
costs of, when first charge, 211.
for a dividend, 270.
by creditor, 115.
Summary administration, 291.
decision, setting aside. 30.
Surety, 236.
remedy against, 93.
Surplus, rights of insolvent to, 273.
Suspension of discharge, 177.

T

Tenancy, 9.
Test of fraudulent preference, 233.
Three months, computation of, 61.
Title, questions of, 24.
Trade or business, 150, 185, 271.
Transfer of property. 4, 18.
fraudulent preference, 40.
when acts of insolvency, 39.
in British India or elsewhere, 42.
made before and in consideration of marriage, 213.
after adjudication, 240.
made within 2 years, presumption, 216.
more than 2 years' back, 225.
in good faith, 219.
for valuable consideration, 219.
Transaction, protection of *bonafide* 237.
True owner, 134.
Trust property, 8, 95.

U

Unable, to pay, 64.
Undischarged insolvent, 59,
obtaining credit, 289.
Undue preference, 183.
Unincorporated company, 54.
Unjustifiable extravagance, 183.
Unliquidated debts, 156.
Unpaid vendor's lien, 199.
Unsecured creditors, 15.

V

Vendor, unpaid, 199.
Verification of petition, 74.
Vest, 115, 128.
Vexatious petition, 111.
Void and voidable, 206.
Void transfers, effect of annulment of, 226.
limitation for application for annulment, 226.
Voluntary transfers, avoidance of, 213.
presumption of, 216.
conditions for annulment of, 216.
in good faith, 218.
who can make application to annul, 221.
onus of proof of, 223.
issues in, 224.
within 2 years, 224.
more than 2 years, 225.
notice of the application for annulment of, 226.

W

Wages, 264.
Warrant, 92.
Wife, gift to, 217.
Winding up of incorporated company, 54.
Withdrawal of petition, 82.

